IPM ASSOCIATIONS

Find us on:

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

MEMBERS QUARTERLY

Celebrating 38 YEARS

News, Updates and Events

APRC
Association of Professional Recruiters of Canada

CPTA
Canadian Professional Trainers Association

CAAS
Canadian Association of Assessment Specialists

CMPA
Canadian Management Professionals Association

SPRING 2021 VOLUME 19, NO. 2

Nathaly Pinchuk
RPR, CMP
Executive Director

Perspective

Video Conferencing: It's Here to Stay

ZOOM etiquette: do's and don'ts of online meetings

We've all seen dogs, cats and kids bomb our Zoom calls and there have been more than a few embarrassing reveals on online meetings. One of the best recent Zoom moments was the Texas attorney who appeared during a hearing before a judge with a cat filter over his face. At least we're getting better at it and there are fewer 'you're muted' shout-outs in recent months. The pandemic may ebb and flow over the next year or so, but it's clear that video conferencing is here to stay for a long time.

That being the case, we thought we would bring you some tips for online meetings — some do's and don'ts that make up the etiquette of video conferencing.

For beginners, here are the basics. If it's your first time on a new program, download the platform or app before the meeting and review all the features that are available. There's lots of online video help if you need it. Then, show up early for your first meeting, at least 5 minutes before the meeting start time. Find a quiet space without interruptions or noise and one that has good lighting. You don't want to be a Zoom ghost. Make sure that the other participants can see your full head. There's nothing more annoying than talking to the top of someone's head.

During the meeting, mute your microphone when not talking and never talk over other participants. Wait to be recognized by the chair or host. Do not check your emails or text people while you are on the call. Treat it like a regular meeting. If something urgent comes up, turn off your video and take care of it. Then come back into the meeting as soon as possible.

Do dress for the meeting. You can wear your pajamas when working from home, but it's not a good look on Zoom. It makes you look unprofessional and that you may not be taking this business meeting seriously. People notice. Try to look into the camera when speaking. It gives the appearance that you are making eye contact with the other participants. Now that's the look you're going for.

Don't eat during the meeting. Coffee and water are fine, but hold off on eating your soup or crunching your carrots until afterward. Make sure you mute yourself as required. If you think about doing something that might be considered private, don't make it public on a Zoom meeting with all of your work colleagues and your boss watching in horror.

Do try to stay focused — or at least look like you are. No one likes meetings and almost no one likes online meetings. Keep unnecessary conversations to a minimum. If you need to check in with another team member about something, send a chat message to get together privately later. If you are the meeting leader, only invite people who need to be there. Save everyone time and trouble by having a tight group who can get your business done as quickly and efficiently as possible. You can email others later with results or follow-ups from the meeting.

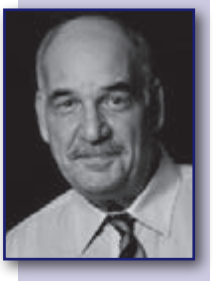
Zoom.US

If you are the host, you should be the last one to leave a Zoom call. Just like the party at your house, wait until all the other guests have left, even those last couple of stragglers, before you turn out the lights. Thank everyone for participating and advise all the participants that you are going to close the meeting. That's their cue to hang up. You can leave the Zoom room open for a few minutes afterwards, but the official meeting is over and you too can go home or back to the kitchen for a snack.

One more piece of advice about video conferencing: Have a great Zoom call!

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

The pandemic may ebb and flow over the next year or so, but it's clear that video conferencing is here to stay for a long time.



Brian W. Pascal
RPR, CMP, RPT
President

President's Message

Shut Up Alexa: Artificial Intelligence I don't need

Here's what they don't tell you in the ads

I am not a fan of these personal assistants. I don't like the way they have intruded into our homes and personal lives. Even if they can quickly give me the step-by-step recipe for just about anything, I don't want them around me — especially at work. The latest trend is getting Alexa to schedule meetings, organize your tasks and track your time. This may sound useful, but what's the price?

The price is a loss of privacy and an opening for big tech to fully inhabit your universe — to move in and take up space. It can even happen without your knowing about it. One of the ways that Alexa intrudes is that she/it is always listening and recording. It's looking for the cue to 'wake' up and perform some function for you. Amazon doesn't record and keep everything you say, but your personal device does. That's a bit creepy, isn't it?

If that doesn't bother you, how about the fact that the newer devices also have a camera? The device can be your personal fashion advisor. If you wish, it will make recommendations on which tie to wear with that new suit. It's simply just a matter of time before it will start making other suggestions as well. It could tell you it's time to repaint or refurnish your office and recommend preferred brands for your consideration. You may want that, but I'm not on board.

There's another feature I have no interest in called Drop-In. This allows you to video call someone without them confirming the call. If they have a similar device, you can start seeing them live without them knowing about it. It's not difficult to imagine the potential issues with this feature alone. It could cause a number of problems, some on the wrong side of the law.

Alexa also keeps a record of every command you issue. You can delete them, but honestly who has the time for that? This means that your little device holds all that information about your requests and anyone who has access to your phone can browse through them at any time. This includes hackers and those who want to access your personal and business information. We have firewalls on our computer systems, but almost nothing to protect us from Alexa. In fact, we freely provide all that information without even thinking about it.

There's another issue I have with Alexa. If I ask the Internet for a suggestion on a specific product, I want to explore all of my options. I don't only want the one suggestion that Alexa provides which is based on preferred products through Amazon. To me, this represents a loss of choice and loss of privacy.

I'm not interested, but thanks for the offer.

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

INSIDE THIS ISSUE

PERSPECTIVE
Nathaly Pinchuk 2

PRESIDENT'S MESSAGE
Brian Pascal 3

FEATURES
Background Checks
Dan Palayew and Odessa O'Dell 4

Substance Abuse in the Workplace
Colin Fetter 6

Psychologically Safe Workplaces 7

Restrictive Covenants
Tom Ross and Dan Weber 8

Childcare and Family Status Accommodation
Kyle MacIsaac and Caroline Spindler 10

Resignation and Termination
Duncan Marsden and Tommy Leung 12

Communicate and Listen Nonjudgmentally
Monika Jensen 13

ASK THE EXPERT
Leading Through Crisis
Carmen Theobald 9

Does Everything the Candidate Says Check Out?

A refresher on background checks

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

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

Feature

It is no secret that candidates put their best foot forward when putting together their resume and attending interviews. It is therefore no surprise that, as employers, we often want to dig a little deeper before extending that offer of employment. Background checks are one way to do just that, but they must be used cautiously.

What is a background check?

Background checks offer employers the opportunity to screen a job candidate beyond their resume and responses in an interview. There are a number of different kinds of background checks available:

- Reference checks;
- Verifying educational or licensing credentials;
- Credit check;
- Social media check;
- Driver's record; or
- Criminal record check.

Are they really necessary?

It might sound ideal for an employer to be able to screen a potential hire so thoroughly. However, employers should take the time to consider which types of background checks are actually necessary before diving in.

Generally, only background checks that are reasonable should be conducted. This means that employers should only conduct background checks that are relevant to the candidate's ability to perform the duties and responsibilities of the position in question.

Employers should also consider background checks in the context of privacy. For some, like federally-regulated employers, background checks are also guided by privacy legislation. In light of this, it is best practice only to collect the information that is required and relevant to the position, and to adhere to legislation and best practice with respect to the collection, use and storage of such information.

Finally, employers should be consistent in their application of background checks. For example, if background checks have been determined to be required for a certain position, they should always be required. In other words, all hires made in that position should be subject to the same background checks.

When to implement background checks?

Once the type of background check that is reasonably required is determined, the next step is sorting out when they should be conducted.

Believe it or not, the timing of a background check is important.

Background checks should only be conducted once a conditional offer of employment is made to a candidate. The conditional offer of employment should also clearly indicate that the offer is pending the result of the background check.

Contrary to popular belief, background checks should not be conducted prior to making a conditional offer of employment. One of the primary reasons for this is to avoid claims of discrimination, ensuring that each candidate gets a fair chance with respect to the information gathered in the recruiting process. During the recruitment stage, employers cannot ask questions that may pertain to human rights-related grounds. This can include information about a candidate's place of origin, age or sex. Because background checks often provide for this type of information, they should not be conducted prior to an offer of employment being made to a candidate from the hiring pool.

Informed consent

Many types of background checks will require the individual's informed consent. This is best practice for concerns already discussed relating to privacy. Furthermore and practically however, many types of background checks, like the criminal record check for example, involve forms that the individual must complete and submit.

If they refuse to do so, the employer can take the position that they are not fulfilling a condition of employment and thus, rescind the offer.

The results are in. Now what?

A conditional offer has been made. The required background checks have been completed. What if something shows up in the results?

The options available to an employer will depend on (1) the type of background check that was conducted, and (2) the result in question. Legal advice is always generally recommended in these circumstances as not all results provide a reasonable basis for an employer to rescind an offer of employment.

Can we conduct background checks on existing employees?

This is not a recommended practice.

There is a recognized distinction between prospective employees versus current

continued next page...

Does Everything the Candidate Says Check Out?

... concluded from page 4

employees being asked to provide a background check, the latter being in a much more precarious position. In short, the courts have viewed it as a "no win" where current employees can only keep their job (which is fundamental to one's sense of identity and self-worth) if they disclose private information for the purposes of a background check.

In order to balance the interests of employers asking for background checks and the involved privacy interests of employees, a number of factors should be considered when looking at asking existing employees to submit to background checks. This will include reasonableness, whether the business interest (primarily physical safety) trumps privacy, and whether there are less intrusive means to address the employer's concerns.

As with background checks upon a conditional offer of employment, the employer would also require informed consent from the employee. The employer may be able to enforce a background check on an employee subject to discipline. However, the circumstances in which that would be acceptable would be very narrow. Primarily, there would need to be a change in the employer's business from the time of hire such that checks become required (i.e., a new requirement of a primary client, etc.).

Takeaways for Employers

Employers wishing to implement background checks should be sure to limit them to only what is reasonably required in light of the position in question, and generally, should only conduct them once a conditional offer of employment has been made.

Outside of the above, background checks can raise precarious issues and can expose employers to litigation, notably in the area of human rights. As such, legal advice is always recommended.

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

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

Colin Fetter
LL. B
Partner, Brownlee LLP

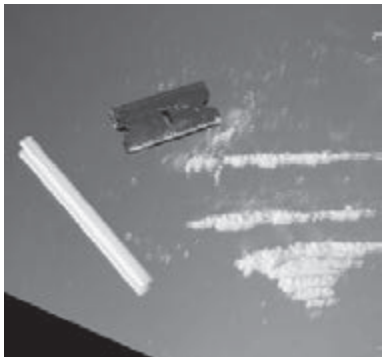
Workplace Response to Substance Abuse

One size does not fit all

In large part triggered by a need to update workplace substance abuse policies as a result of legalization of cannabis, many employers have recently made great strides towards clear proactive substance abuse policies and procedures within their workplace. While the recent spotlight on this issue has led many employers to update and upgrade their approach, some employers rely too heavily on a standardized approach and application of their new policies and procedures without a proper assessment of the facts for each particular case that may require a differentiated approach.

A recent decision by the Alberta Human Rights Tribunal reaffirms the idea that the accommodation process involving a (potential) substance abuse disorder (SAD) is an individualized process and should not be treated in a one-size-fits-all manner. An employer must assess each occurrence on a case-by-case basis and consider all the evidence available, including information provided by any investigation of the situation (including supervisors and/or coworkers), medical personnel and the employee themselves. Attempting instead to apply a static strategy to every potential case of a disability can result in a finding that an employer has not discharged its obligation to accommodate.

In *Maude v NOV Enerflow ULC*, 2019 AHRC 54, the Tribunal considered whether an employer had discriminated against one of its employees on the basis of a perceived disability by insisting that the complainant seek a 28 day residential treatment for a SAD. While the employer had



properly followed its policies and procedures leading to a drug test showing cocaine, referral to a substance abuse professional (SAP) and following the SAP recommendation for the 28 day residential treatment program, the Tribunal found the employer failed to give reasonable consideration to a number of other pieces of evidence including:

1. The assessment results indicated a "low" or "no risk" of dependency, including a zero score with regards to cocaine dependency specifically, yet still recommended a 28 day residential treatment program;
2. There was no evidence the employee had ever attended work impaired and this was verified by his supervisors;
3. Multiple other treatment and risk reduction options were available that did not involve a residential treatment program; and
4. There was non-safety sensitive work available while treatment was obtained.

Given the above, the Tribunal concluded that the employer did not take reasonable measures to accommodate as lesser treatment and risk mitigation measures were available and were more appropriate in all of the specific circumstances.

Other common missteps by employers include applying employer rights and testing measures supported by the case law for "safety sensitive positions" to non-safety sensitive positions.

Here are some of the key lessons learned from this case example:

1. Yes, it is important to have a substance abuse policy and to follow it.
2. Yes, in the right circumstances, an employer will have the right to test and to insist on treatment recommended by the advising substance abuse professional.
3. However, the policy and an employer's implementation of the policy must be careful to permit and to actually conduct a careful case by case review and not to blindly follow the letter of a policy or treatment recommendation without a thorough review and consideration of the entire context, evidence and range of available accommodation approaches.
4. This could include an analysis of the assessment process, information collected from coworkers/supervisors, communication between medical personnel and the employer, consideration of other positions for an employee (i.e., non-safety sensitive) to occupy during any treatment and consideration of less restrictive treatment options.

continued on page 15...

Feature

Focus on Mental Health: Psychologically Safe Workplaces

The current state of affairs

Members Quarterly Staff Writer

Feature

A Change in Thinking

Occupational health and safety have long been a priority for both employers and their employees in Canada. But until recently, little attention has been paid to how well employees are doing in regard to their mental health and mental well-being. That has changed, however, and now many Canadian employers are shifting their focus to look after not just their employees' physical safety, but their psychological well-being as well.

Employees are trying to deal with the increased risk of developing chronic diseases, strokes and heart attacks. Employers are struggling with the added cost of sick leave, disability payments and skyrocketing prescription drug costs on their employee benefit plans. Some have estimated the cost of all these additional expenses to Canadian employers at over $50 billion per year in health and absence related costs. This all adds up to good sense for everyone to focus on mental wellness at work.

Working from Home

Despite the relatively successful transition to remote work that many organizations have achieved over the course of the last few years, the COVID-19 crisis is leaving lasting scars in the form of burnout, anxiety and mental toll. Operational agility aside, the transition to working at home has not been smooth sailing for everyone. On top of the logistical concerns, there is also the stress driven by fear of job losses, the unavoidable distortion of work/life balance, isolation, workplace suitability and lack of adequate or reliable technology.

In order to come out on the other side of this intact, all organizations are going to have to invest in resources and programs to ensure their workforce has the support they need to continue feeling that work is a psychosocially safe space.

Change for the Better

Some workplaces have cultures of bullying and harassment that create psychologically unsafe working conditions where people are afraid and insecure. Some workers develop anxiety conditions and others have more serious mental health issues like clinical depression and mood disorders. In workplaces where there is potentially a high level of workplace violence, there can be deep emotional scars and trauma. This is now a reality in a range of occupations ranging from front line social service workers to bank tellers to nurses or first responders.

Many employers are moving to make their workplaces a psychologically safe place to work. Some are encouraging and supporting positive mental health initiatives to adopting anti-bullying programs throughout the organization. Others are focusing on mental well-being at work by taking part in the ongoing work of the Mental Health Commission of Canada and adopting the National Standard of Canada for Psychological Health and Safety in the Workplace.

Mental Health and #MeToo

The #MeToo Movement that began in October 2017 has spearheaded a much-needed dialogue surrounding the consequences of workplace sexual harassment and violence. The psychological impact of this kind of behaviour is still being unpacked and is raising important issues regarding the gender differences that are seen in mental health disorders. It is now well established that women experience mental health disorders at a much higher rate than men and are twice as likely to have major depressive disorder.

continued on page 15...

Restrictive Covenants in the Commercial Context

Alberta Court of Appeal uses blue pencil to save non-compete

Tom Ross
Q.C.
Partner, McLennan Ross LLP

Dan Weber
J.D.
Partner, McLennan Ross LLP

Feature

A recent decision by the Alberta Court of Appeal, *City Wide Towing and Recovery Service Ltd. v. Poole*, 2020 ABCA 305, revisits whether a court can sever or restrict overly-broad provisions within restrictive covenants (known as "notional" severance and "blue-pencil" severance) in order to save them. This case also holds that the doctrine of severance has broader application in the commercial setting than the employment setting.

At issue in this case was the enforceability of a non-competition clause agreed to by Devon Poole as part of the sale of his business, Capital Towing ("Capital"), to City Wide Towing and Recovery Service Ltd. ("City Wide"). After the sale closed, Poole resigned from City Wide's employ and began employment with DRM Recovery Ltd. ("DRM"), an alleged competitor of City Wide. This prompted City Wide to bring an action and application for injunction against Poole and DRM for breach of the restrictions in the commercial agreement that Poole entered into as part of the commercial sale.

The Chambers Judge granted the injunction application and issued an order (the "Order"), which was the subject of the appeal before the Court of Appeal. The Court of Appeal held that the analysis of the Chamber Judge leading to the Order was incorrect:

> In the present case, the chambers judge analyzed the geographical scope of the non-competition agreement by looking not at the activities of the business sold by Poole (i.e., Capital), but rather the business of City Wide. In concluding the geographical scope was reasonable, she noted that City Wide "had customers or carried on business in the particular provinces" and "had stated an intention to expand and develop the businesses in those provinces": AR, F4/36-38. This was the wrong focus. The chambers judge should instead have determined the area in which Capital carried on business at the time it was sold by Poole to City Wide.

The central question on appeal was thus whether a restrictive covenant that is entered into as part of the sale of a business, and which is *prima facie* unenforceable as overbroad in geographical scope, may be saved by severing the overbreadth from the rest of the agreement. The majority of the Court of Appeal answered the question in the affirmative. In doing so, the majority distinguished the rigorous application of the doctrine of severability in the employment context (e.g., in employment agreements) from that of the commercial context (e.g., in sale business agreements). Typically in an employment agreement, an overbroad restrictive covenant will be wholly unenforceable rather than narrowed in scope.

The Court's application of severance resulted in the majority amending the non-compete area in the Order to apply only to Alberta instead of Alberta, British Columbia, and Saskatchewan (as originally drafted). The majority of the Court said:

> We conclude that Shafron does not speak to blue pencil severance of restrictive covenants in commercial contracts and therefore does not preclude its application in the present case. Moreover, blue pencil severance is supported in this case by the English authorities, ACS Public Sector, and a number of decisions of first instance, including Sterling Fence Co. Ltd. v Steelguard Fence Ltd., 1992 CarswellBC 1771 (BCSC); Restauronics Services Ltd. v Forster, 2001 BCSC 922, rev'd in part on other grounds in 2004 BCCA 130; and GDL Solutions Inc. v Walker, 2012 ONSC 4378.

Writing in dissent about the policy concerns arising from the majority's decision, Justice Slatter referenced the Supreme Court of Canada decision in *Shafron*, in which the Court's concern that permitting severance is an invitation to employers to draft overly broad restrictive covenants with the prospect that the court will only sever the unreasonable parts or read down the covenant to what the court considers reasonable. It bears repeating that the majority held that *Shafron* was inapplicable to commercial contracts.

This decision serves as a cautionary reminder that employers should carefully review and draft employment-related restrictive covenants to protect legitimate interests. It is also a helpful authority to provide greater latitude when enforcing restrictive covenants in the commercial setting where the court will more readily accept there is a balance of power between the parties (and less reason for judicial intervention).

Tom Ross is a partner with McLennan Ross LLP in Calgary and can be reached via email at tross@mross.com.

Dan Weber is a partner with McLennan Ross LLP in Edmonton and can be reached via email at dweber@mross.com.

Leading Through Crisis

It's also a catalyst for tremendous growth

Carmen Theobald

Leadership Coach, True Presence Horse Sense

Ask the Expert

Q One of my team members has just been found guilty of workplace harassment and is now off on leave. This employee is one of the senior members of the team and took on a great deal of responsibility and workload. The rest of the team is quite concerned with the effect this will have on the remaining members. How do you suggest we handle this?

A This situation is incredibly difficult for everyone involved. Perspectives on recent events will vary greatly and interpersonal dynamics can become highly strained. Then there is the impact of workload and responsibility shifts — everyone is deeply affected.

To navigate this, the manager needs to play a significant role in leading the team's dynamics to a healthier place. This means paying just as much attention to the team's emotional health as to its results.

Prepare for discomfort. Yes, you do need to talk about it. No, it won't be fun.

As a leader, you need to be able to sit in uncomfortable emotions without having knee jerk reactions. Anger, frustration, resentment and fear are some emotions to be expected. Breathe through any personal discomfort and try to see the perspective of each person you speak with. You can't fake good listening — you have to truly care.

Get help. As the manager, you will be supporting others through this process. You need support too. Find someone who is not involved, preferably outside of the organization who you can lean on and generate ideas. If your organization has access to an Employee and Family Assistance Program, consider briefing a counsellor privately and asking for their advice to support you and the team.

Set up individual meetings. Before inviting a conversation with the team as a whole, set up one-on-one confidential conversations to give everyone the time and space to be heard. Take thorough notes.

Pay close attention to factions that may be forming and don't wait too long to intervene. Make every effort to reinforce that this is now a whole team problem requiring a whole team solution.

Approach the team as a whole with a goal. Start off by summarizing what you've learned through the individual meetings (without betraying anything said in confidence), while addressing the concerns to the best of your ability. Open the discussion to the group. Ask questions like: what's our team vision for the future, specifically the way we want to behave toward each other? What is the ideal way we can move forward? What else needs to be included here? What do we need to do so that this plan can be successful? What are the potential pitfalls? How can we move past them?

When addressing impacts of change, we don't want an unrelenting venting session without a productive ending. Guide the discussion with the goal of making an action plan.

Consensus is likely impossible. However, everyone needs to be able to express what they think before they can truly commit to a new direction. All voices in.

Tap into strengths. There is an enormous amount of extra responsibility to be re-distributed. Keep an open mind — strengths don't necessarily translate to job title. It's time to look at all the tasks at hand with fresh lenses and see the big picture.

Don't be afraid to shift what is normal to accommodate the new workload. Assess what responsibilities could be moved around, at least temporarily, to make room for the most qualified people to take on new work.

Model and encourage congruence. Without going into great detail about our personal experiences, we can still have enormous stress-relieving impact on our team by acknowledging what we are going through. In the book *Social Intelligence*, Daniel Goleman cites studies that prove emotions are contagious. What's more, when we attempt to wear a mask of "all is fine" while hiding our true emotion underneath, our blood pressure rises as does everyone else's in the room. Going from this mask-wearing incongruent state, to becoming congruent with a statement such as "this brings up a lot for me, but I am working on it and I'm committed to the team", immediately reduces the blood pressure of everyone involved.

Regularly Check In. Keep checking in even after a new direction is set. Regularly create space to ensure both behavioural and work norms are on track.

Nothing about this situation is easy, but it can be a catalyst for incredible growth. Take the opportunity to lead wholeheartedly with courage.

Carmen Theobald is a Socially Intelligent Leadership Coach and Advanced Eponaquest Instructor and Owner of True Presence Horse Sense. She can be reached at carmentheobald@gmail.com.

Kyle MacIsaac
LL.B
Partner
Mathews Dinsdale Clark LLP

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

Feature

Personal Preference or Legitimate Need? Childcare and Family Status Accommodation

Only activities that engage a parent's legal responsibilities are protected

Employers have an obligation under human rights legislation not to discriminate on the basis of protected grounds and an accompanying duty to accommodate employees to the point of undue hardship. The accommodation process is a cooperative one with all workplace parties (employer, employee and union, if applicable) taking an active role. Despite the cooperative approach, the accommodation process is often complex, particularly when it comes to determining an appropriate accommodation. Unlike accommodation in relation to disability, which may be resolved through comprehensive medical documentation outlining an appropriate accommodation, accommodation in relation to family status is generally far less clear, which begs the question: is the requested accommodation a personal preference or is there a legitimate need?

The protected ground of family status engages the relationship between parent and child in the context of both child care and elder care and encompasses legal responsibilities that arise from that relationship as opposed to desired responsibilities. For example, the need to provide childcare to a 2-year-old child versus the desire to take the 2-year-old child to dance class. The "want" versus "need" debate in the context of a parent-child relationship, which is especially relevant with our "new normal" since the onset of COVID-19, arose in *Wing v Niagara Falls Hydro Holding Corporation*, 2014 HRTO 1472. The Applicant was a

Emma Bauso — Pexels

municipal councillor of a municipality that was the sole shareholder of the Respondent corporation. The Respondent was governed by a Board of Directors made up of municipal councillors and the mayor, who received an honorarium for being Board members. In the years leading up to the Applicant's Application, the Board met three times per year on an *ad hoc* basis, with meetings generally held between 3:30pm and 4:30pm. At that time, the Applicant did not have issues with attending the meetings. In 2012, the Applicant missed all three Board meetings for various reasons: one due to tax filings; one due to a conflict of interest with the subject matter being dealt with at the meeting; and the other because the Applicant had to pick up her young child from school and take her to swimming lessons because her spouse was working. At the third meeting that the Applicant missed, a motion was passed that in the coming year, there would be six Board meetings held at 3:30pm and if any Board member missed two consecutive meetings, they would be removed from the Board. When the Applicant became aware of this, she contacted the President of the Respondent to express her concerns over the timing of the meetings and the fact that she would not be able to attend meetings at that time because she would have to pick up her daughter from school and may also have to bring her with to the meeting. The President advised that timing of the meetings was a matter for the Board, suggesting that a discussion be had with the Chair, and that the Applicant make childcare arrangements or arrange to attend the Board meetings by phone. The Applicant rejected the President's suggestions and advised that her preferred accommodation would be to have the meeting time changed to 4:30pm. The meeting time was not changed prior to the first meeting in 2013 but ultimately was changed to 4:00pm. The Applicant filed the Application alleging that the Respondent discriminated against her in employment on the basis of family status.

continued next page...

Family Status Accomodation

... concluded from page 10

At the hearing, the Respondent argued that there was no discrimination in employment on the basis of family status because the Respondent was not the Applicant's employer as she was employed by the municipality, which was the sole shareholder of the Respondent corporation. The Adjudicator agreed with the Respondent and dismissed the complaint on this basis but went on to consider whether the Respondent had discriminated against the Applicant on the basis of family status. The Adjudicator confirmed that only activities that engage a parent's legal responsibilities are protected under the ground of family status.

Evidence at the hearing revealed that the Applicant chose to enrol her child in the same school her older child had attended, which was 20 minutes outside of the community, and that the child was not enrolled in an afterschool program because the Applicant's older child had not been. The Applicant's rationale for this was that she sought to provide her younger child with a similar experience as her older child. The Adjudicator commented that the Applicant chose to pick up her child after school rather than send her child to an afterschool program, which was a personal choice rather than a legal responsibility and that there was no evidence that the Applicant considered, or made reasonable efforts to find alternative solutions. The Adjudicator concluded that the Applicant failed to establish that the meeting time had adverse effects on her on the basis of being a parent and therefore failed to establish a *prima facie* case of discrimination on the basis of family status.

> The accommodation process is a cooperative one with all workplace parties (employer, employee and union, if applicable) taking an active role.

The notion of a legal responsibilities over personal preference with respect to family status accommodation has been confirmed in subsequent cases including *McClean v Dare Foods Limited*, 2019 HRTO 1544. When presented with accommodation requests based on family status and childcare, employers are entitled to make reasonable inquiries in order to determine whether or not there is a legitimate need for the request and should work cooperatively with the employee throughout the accommodation process.

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

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

Quitting Ain't Easy: The Fine Line Between Resignation and Termination

Get it in writing and leave nothing to chance

Duncan Marsden
LL.B
Partner/Regional Leader, Borden Ladner Gervais LLP

Tommy Leung
J.D.
Associate, Borden Ladner Gervais LLP

Feature

There is of course a world of difference between a termination of employment by the employee (resignation) and a termination of employment by the employer without cause in terms of employee payments. However, differentiating between a resignation and a termination of employment by the employer can sometimes be tricky. Employers should be careful in considering their exposure even if an employee has expressed an intention to resign.

The Test

In Alberta, for a resignation to be binding, it must be clear and unequivocal. The test involves 2 parts:

1. Did the employee intend to resign based on that employee's own state of mind? and
2. Would a reasonable employer in the same circumstances have understood that the employee resigned?

The onus of proof is on the employer rather than on the employee. It is the employer who is expected to make further inquiries with the employee where there is a potential for misunderstanding.

Josta Plywood Sales Ltd. v Tracy Lind

One recent Alberta Labour Relations Board decision on this matter is *Josta Plywood Sales Ltd. v Tracy Lind*. The facts are as follows. One Saturday, Ms. Lind was off sick but she was back to work the following Monday. While at work, she was still not feeling fully recovered and was standing by the door to get fresh air when the assistant manager directed her to clean the bathroom, which was part of her duties. A disagreement ensued as to when she would complete this task during her shift. Finding that she was acting confrontationally, the assistant manager asked her, "Would you like to go home?" and she did, in fact, then go home.

The Board found that the employee genuinely thought her employment was terminated by her employer. This was the case even though some of the circumstances suggested that she should have known her employment was not terminated. For instance, in her years of employment with the employer, she had never seen anyone's employment terminated on the spot, without any paperwork, by simply being asked to go home. Even so, it was her *subjective* state of mind that mattered for the first part of the test.

When the employee did not report to work, the employer did connect with the employee to clarify the situation via text message. The employer told the employee that it was unfortunate that she had decided to walk out, while the employee responded by indicating "I didn't walk out — I was told to go home." The employer did not respond to this message.

The employer also sent a follow-up letter to the employee. However, the Board found that the follow-up letter was not so much an attempt to clarify the employee's intention, but more of a statement to the employee telling her it was her choice to leave her employment. The Board stated that the letter would have been a good opportunity to seek clarification, and held that it was incumbent on the employer to clarify whether the employee was, in fact, quitting.

Since the employer did not seek clarification, the Board held that the employee's employment was in fact terminated by the employer, resulting in termination pay.

Retractions

Even in situations where employees actually intended to resign, that may not be the end of the story. In *Robinson v. Team Cooperheat-MQS Canada Inc.*, 2008 ABQB 409, the court found that even though the employee had resigned, the resignation was retracted the next day. The court found that employees are free to retract their resignation unless the employer has acted to its detriment in relying on it, such as the employer incurring costs to replace the employee due to the resignation.

Key Takeaways

If an employee wishes to resign, it will be crucial for the employer to have this intention evidenced in writing and, if there are any doubts, the employer should seek clarification. Of course, this will not fully mitigate the risk of the employee retracting their resignation. If the employee retracts their resignation, the employer will need to consider whether the resignation has already been accepted and the costs that the resignation has caused, if any, in deciding whether to enforce the resignation or agree to the retraction.

Duncan Marsden is Partner/Regional Leader with Borden Ladner Gervais LLP and can be reached via email at dmarsden@blg.com.

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

Communicate and Listen Nonjudgmentally

Dealing with mental health issues in the workplace

Monika Jensen
Ph. D

Principal,
Aviary Group

Feature

In recent years, many high profile individuals have come to the attention of the media as a result of their actions. We are finding mental health issues are more of a concern and the means to address them is more complex. Here are some tools to assist you when speaking with your colleagues or employees.

Communication is not just saying the words — it is creating correct understanding. Active listening is an essential skill in the communication process. Dr. Marius Pickering from the University of Maine identifies these characteristics of empathetic listening:

- The desire to be "other-directed", rather than to project one's feelings and ideas onto the other person.
- The desire to be non-defensive, rather than to protect themselves. When they are being protected, it is difficult to focus on another person.
- The desire to imagine the experience, roles and perspective of the other person, rather than assuming they are the same as one's own.
- The desire to listen as the receiver, not be critical; and
- The desire to understand the other person rather than to reach either agreement from or change in that person.

Interestingly, the average person speaks at a rate of 100–150 words per minute. An auctioneer, on the other hand, does a rapid-fire 250 to 400 words per minute. Those, however, are exceptions. When you are just having a chat, you will usually speak at a rate of 110 to 130 words per minute. Most listeners understand as many as 600 words per minute, which is why we talk so quickly sometimes. That means everyone is a good listener. Not true! We can lose our focus for many reasons: we do not understand what is being said, we do not agree with the speaker, we are bored or lack interest, or we want to give answers.

The person sharing the information becomes aware they are not being listened to and begins to feel more unheard and rejected. To really listen, we must practice active listening. Yes, it is a skill that may be learned and mastered. When dealing with stressful situations in the workplace, we need to be a supportive listener by showing warmth and caring in the way we listen.

Here are some quick tips on how become a better listener.

Don't interrupt. Silence is a powerful tool. Remain quiet and let the other person think. You cannot listen and talk at the same time.

Keep an open mind. Do not judge or jump to conclusions. Think before you respond.

Make listening a priority. Stay focused. Stay in the present. Eliminate distractions like emails and cell phones.

Show respect for the person and their feelings, even if you disagree.

Avoid giving advice, even when asked. Offer options and suggestions. Allow the other person to discover their best answer.

continued next page...

"I don't think the employees like me."

Communicate and Listen Nonjudgementally

... concluded from page 13

Master the art of asking good questions — open-ended (How...? What...? Could...? Would...?). Alternatively, closed-ended (Is? Are? Do? Did?)

Listen with empathy. Try putting yourself in the other person's shoes to try to understand their point of view.

Use attending behaviours to let the person know you are listening, such as "mmmm," "uh-huh" or "I see".

Watch non-verbal behaviour. Clarify to ensure you are reading the non-verbal behaviour correctly. Keep an open body posture, sit down if possible and try to sit beside the person rather than facing them. Maintain eye contact if culturally appropriate, but do not stare.

Check to make sure that you understood. Review what you think you heard and ask for clarification to ensure that you've grasped what is being said. Paraphrase in your own words. Summarize to ensure you have received the correct message, focus and understanding.

If your expectations of the discussion are not met, be aware that your actions may still make a difference — that person who approached you may consult someone else about their problem.

Provide feedback. Give open, honest feedback. You should again check for understanding.

At the end of the conversation, you should discuss what will happen next and who will take action. If after the conversation you feel distressed, find someone to talk to for support and advice while respecting the other person's privacy. If your expectations of the discussion are not met, be aware that your actions may still make a difference — that person who approached you may consult someone else about their problem.

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

Content Continued...

Workplace Response to Substance Abuse

... concluded from page 6

In summary, we are very encouraged by the steps most employers have taken towards clear proactive substance abuse policies and procedures within their workplace. There have also been some "wins" for employer enforcement of workplace safety in this area within the case law in the last few years. However, in each case, it is still critically important that these policies and processes be implemented carefully considering each context and all of the available evidence and options for accommodation while protecting safety.

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

Bookmark

WWW.WORKPLACE.CA

This ***Members Quarterly*** is available online for those members and readers who find it convenient. You'll also find the most current information here on today's hot topics in managing the workplace, programs and tools to assist you as well as other news.

See you online!

Focus on Mental Health

... concluded from page 7

A reason for this discrepancy is undoubtedly problems of equality in the workplace. In Canadian workplaces, a gender pay gap that is double the global average still exists. This means that women earn $8,000 less annually than men in Canada, compared to $4,000 less worldwide. It is critical that every psychologically safe workplace has a clear game plan, including policies and procedures that define harassment/sexual harassment and other behaviours that are unacceptable in the workplace.

Setting a New Standard

While there is certainly still plenty of work to be done, one key piece is the National Standard of Canada for Psychological Health and Safety in the Workplace that came out of the work by the Mental Health Commission of Canada. The Standard provides a framework to help guide employers of all sizes as they work toward psychologically safe and healthy workplaces.

The Mental Health Commission of Canada continues to be at the forefront of workplace mental health. In addition to the Standard, the Commission has also been sponsoring and supporting a number of other activities that help foster psychologically healthy workplaces. This includes a course in mental health first aid that has been delivered to over 30,000 people across Canada.

What can you do?

Almost everything helps when it comes to improving the psychological health of workers and the workplace. Open communications about mental health issues at work and encourage people to talk to one another. Practice positive role-modelling from the front by having managers take their weekends off and discourage excessive overtime. Get outside help and resources. A good first place to begin is at the area on the Mental Health Commission of Canada website devoted to workplace mental health. You will find access to training and support as well having the ability to connect and communicate with other employers in your field. Here is the website **https://www.mentalhealthcommission.ca/English.**

Members Quarterly Staff Writer

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


Go For It!
IPM ASSOCIATIONS
We've already reserved your designation...
RPR
Registered
Professional Recruiter
RPT
Registered
Professional Trainer
CMP
Canadian
Management Professional
Institute of Professional Management
2210-1081 Ambleside Drive, Ottawa, Ontario, K2B 8C8
Tel: 613-721-5957 Toll Free: 1-888-441-0000 www.workplace.ca