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SPRING 2022 VOLUME 20, NO. 2

Nathaly Pinchuk
RPR, CMP
Executive Director

Perspective

The Workplace of Tomorrow

It's all about tech, space and collaboration

Our workplaces have changed so much in the last number of years that it is hard to imagine more changes coming. According to workplace and technology experts, the biggest changes may be just around the corner. Technological advances are leading the way and as we already see, they give many more people the capacity to work from home. As we shift to 5G networks and are able to live video stream in real time without lag or delay, that is the equivalent of moving from dial-up to Wi-Fi.

So, let's start there. How will technology change tomorrow's workplace?

Technology leads the way

There are so many new developments in technology that it's hard to keep up. Smart phones and laptops have made work and communication possible from anywhere and digital whiteboards and multimedia platforms are changing the way we present, discuss ideas and develop new products and services. Email is almost over as a means of business communication as it is replaced by messaging apps and handheld devices with smart screen touch. We are able to access any person or file at any time of night or day from anywhere in the world.

All this technology is simple to learn and operate. There are few moving pieces to break down and all memory is stored in a cloud circling the planet. Think about videoconferencing like Zoom which has killed the telephone call, let alone teleconferencing. Why just talk when you can see and work together on a screen, sharing docs through Dropbox or Google? We no longer even have to type or keyboard. We can swipe our screens which will soon be able to recognize our voice and talk back.

Space is no longer the final frontier

The office isn't what it used to be- if there is even an office. More employees are working remotely and as the pandemic revealed, they can be just as effective and productive from their home office as their office location. This has already resulted in companies reducing their physical presence and moving at the very least to a hybrid or split workforce that will need much less office space. The space that remains will likely be shared, open-concept and may even be part-time cubicles that can be booked when a remote worker wants to work from a fully equipped office.

There's also no need for infrastructure downtown like expansive telephone systems or IT facilities. All of that can be outsourced remotely to the cloud. The help desk can be located anywhere, even in an IT employee's basement. If there is space downtown, it will likely be an open space where employees can meet in person to brainstorm and hold team bonding sessions. One creative idea that some organizations have tried is to forget about office space and instead create office cafes and garden spaces where employees can connect and work individually or as a team in a much more relaxed environment.

Collaboration is the whole point

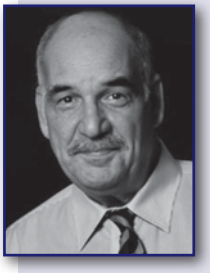
The whole point of many of these innovations is to create a positive environment for team collaboration. There are specific team collaboration tools like Cisco Webex Teams which are a full suite of office technologies from video and digital whiteboards to messaging apps to file sharing. These all work together to allow people to communicate faster and more effectively. They allow leading edge organizations to transform the world of business. As we move further into the future, technologies like AI, AR and virtual reality will only increase the powers of these collaborative tools.

Employees will be able to connect on their virtual desktop to any device, access team meetings and collaborate in real time, or download all the sessions and work at their own pace later. All this is done from the safety and security of their home or office. Managers won't be left out and all of the information and work can be easily monitored and measured from wherever they choose to work as well.

Welcome to the office of the future- it's going to be a very exciting ride!

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

"That company credit card was for business purposes only. So would you kindly return that Harley you bought?"



Brian W. Pascal
RPR, CMP, RPT
President

President's Message

Weed at Work — *It's not good for business*

I don't care much about what you do when you're not at work. Note that I didn't say that I don't care at all. There are many behaviours, legal and illegal, that I would prefer you didn't engage in. They could have an impact on your work or your reputation and therefore on me and my organization. I do care a lot about what you do when you're on my dime. That brings us to marijuana.

The fact is that according to Statistics Canada's National Cannabis study, an estimated 500,000 workers admitted to using weed before they headed off to work. With this in mind, it's time to take another look at the legal framework and best practices employers can use to limit the use of cannabis in the workplace.

Legalized weed has altered the landscape when it comes to employees' private lives. Unless you work in the transportation sector or in a position where even the smallest impairment could cause problems, like a brain surgeon for example, there is no legal prohibition that employers can place on their staff smoking or ingesting weed on their own time. Some industries like airlines are trying to bring in 28-day prohibitions before an employee's shift, but those restrictions don't tend to go anywhere once they are challenged in court.

There has been very limited success in implementing drug testing in any sector in Canada and several cases are still winding their way through the appeals system. So how will employers know if someone has used marijuana anyway? The impairment tests, even for driving, are still subject to errors. As THC, the active ingredient in cannabis, can stay in the human system for about a month, there are few ways to tell when an employee last smoked weed. It's all very blurry.

In addition, since the start of 2020, businesses have been authorized to sell marijuana edibles, topicals and extracts. They are also impossible to detect and some have the capacity to overact and can cause impairment and lead to serious accidents at work. The only way to deal with this new development is to train supervisors on how to spot impairment and have a strict policy to openly address this somewhat hidden problem.

The case law so far is clear. Anything that happens at work or on your property could be subject to discipline. There are some exceptions in the case of medical marijuana where employees can request accommodation from their employer if they have a prescription. You don't have to take their word for it and you can require them to provide documentation from a doctor. Also, these rights can be curtailed if it puts others at risk.

There will be much more discussion and more court cases before everything is settled on this issue. In the meantime, take the appropriate steps to protect your business and your entire workforce. Hence no weed at my workplace. We don't need any more smoke to cloud our judgement or our potential for success.

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

INSIDE THIS ISSUE

Keep it Clear to Keep it Confidential

Breach of confidentiality even with policy in place may not justify termination

Tommy Leung
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J.D.

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Feature

Employees often have access to many types of company and personal information that employers do not want to be disclosed outside of or even within the workplace. If an employee discloses such sensitive information without authorization, an employer may feel compelled to terminate the employee's employment for cause. While the law may have supported this reaction in the past, the analysis today is a bit more complicated.

This issue was recently explored in *Klassen v. Rosenort Cooperative Limited*, 2020 MBQB 116. In *Klassen*, the employee had been the general manager of the Rosenort for ten years. The employer found out that the employee emailed an internal price list to a local manufacturer. The employee was terminated for cause alleging that the employee breached confidentiality.

However, the employer had no written confidentiality policy and the court found that the internal price list was not "confidential information" under the common law. As a result, the employer did not have just cause to terminate the employee's employment.

Contextual Approach

Since the Supreme Court of Canada's decision in *McKinley v. BC Tel*, 2001 SCC 38, termination for cause has been assessed using a contextual approach, where the sole issue for the trial judge to consider is whether the conduct caused a breakdown in the employment relationship. In making this decision, the Supreme Court of Canada proposed an approach based on proportionality to strike an effective balance between the severity of an employee's misconduct and the sanction imposed. As such, a trial judge may determine whether the length or quality of service is a relevant factor that mitigates the effect of the misconduct on the employment relationship based on the specific facts and circumstances of a particular case.

Policy or No Policy

Under the McKinley contextual approach, having a clear policy is an important factor. In *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127, the court found that the trial judge did not err in principle in applying the *McKinley* analysis, because the trial judge was aware of the length of the employee's service, and the seriousness of the transgression, all of which she considered in the circumstances of the employment relationship and the employer's clear policy on privacy-related matters. Ultimately, it was open to the trial judge to find that, in these circumstances, breach of the confidentiality policy and failure to follow Helpdesk protocols resulted in a fundamental breakdown of the employment relationship.

Not having a clear policy significantly increases the likelihood that cause will not be justified even if the employee breaches confidentiality. For example, in an Alberta arbitration decision, *TISI Canada Inc. v. Quality Control Council of Canada*, 2007 CarswellAlta 1841, an employee's gossiping led to the identification of the complainant to a sexual harassment complaint. However, the arbitrator found that while it was clear the employer wanted to keep the matter confidential, the employer failed to give a specific and direct order to the employee to do so, there was no warning that failing to keep the information confidential would lead to termination and there was no progressive discipline. Having had a good employment history, termination was found to be excessive. A solid confidentiality policy clearly setting out the employer's work rule regarding confidentiality and potential disciplinary actions for a breach will likely help clear some of the defects mentioned by the arbitrator.

However, noting the principle of proportionality discussed above, it is important to be cautious in light of the *McKinley* contextual approach that having a clear policy is not on its own always determinative in deciding whether a breach of a confidentiality policy is sufficient in justifying termination for cause. For example, in *Vorgias v. Madawaska Doors Inc.*, 2005 CarswellOnt 9371, a new employee was alleged to have breached a confidentiality and non-disclosure policy that specified potential disciplinary actions including dismissal. However, the court found that the employee's misconduct did not justify cause because he did not purposefully act in breach of his duties towards the company, and because he was new, some mistakes were inevitable.

Takeaways

Although it is not always foolproof, employers should establish a clear confidentiality policy to communicate what the reasonable work rules are when it comes to confidential information and the potential consequences (such as termination) in the event the policy is breached. Failing which, it may be difficult to terminate an employee's employment for cause unless it is highly egregious. Employers must keep in mind the importance of considering the context of the breach, even with a clear confidentiality policy, before deciding whether termination for cause is proportional to the breach. Due to these nuances, employers should seek legal advice before making such a decision.

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Workplace Investigations: The Final Report

Writing a report that will hold up in court

David Ray, J.D.
Core Resolutions

Feature

You've completed your investigation and now it's time to put together a report. Reports have multiple purposes including advising decision makers, providing a record to prepare for a legal or regulatory follow-up, creating communication to affected parties and demonstrating a thorough review of the complaint with recommendations to resolve any issues. The report will describe events, interpret their significance, provide conclusions based on facts and suggest recommendations that are practical and add value.

While preparing to write the report, consider the method of presentation of the substance matter. The report writer should consider the best method to present the findings to the reader and consider whether it is best to report them in a chronological order or by dividing the report into the specific issues that were investigated. A table of contents, executive summary, protocol for the inquiry and relevant sections of the policy and/or legislation will help to put the findings in context. Where appropriate, tables and photographs may also help to demonstrate the investigator's findings. The report should also identify people interviewed, findings, conclusions and recommendations. The findings format may outline each of the allegations, results of interviews with the complainant and any witness and then the reply to the allegation by the respondent.

Conclusions must be based on relevant and supportable information provided in the findings and it may be beneficial to repeat the support for each of the conclusions that were outlined in the main body of the report. Conclusions and recommendations should also consider the root cause of any failures. A report concluding that an employee is guilty of harassment does not identify the root cause and the investigator should consider other intervening factors that may address the root cause. On investigation of the cause of harassment, the investigator may identify management, training or policy issues that may be relevant to the cause. Recommendations should suggest the investigator's judgement about improvement and should be specific, achievable and measurable. Some organizations also prefer an executive summary although I find many decision makers wish to read the whole report. A report that is well structured and easy to read can help in understanding the five W's rather than just raising more questions.

The writer should consider that the reader may have little knowledge of the area or work process that may be relevant to the investigation. We suggest that acronyms and jargon should be avoided or explained and other pertinent information should be provided. The report should also use shorter words, sentences and paragraphs and it is sometimes necessary to repeat names for clarification. For example, the statement "Mr. James said that Mr. Black stated that the harassment was caused by his lack of experience and he didn't attend the awareness sessions. He said he would arrange to get more training." This raises questions about who lacked the experience, who did not attend the sessions and who will arrange the training.

Other things to consider in the report are the effects of any founded harassment on the complainant, what the complainant would like to see achieved and supported comments on credibility of those interviewed. The writer should also be cognizant of the fact that reports must be specific and detailed about what happened. A comment that the respondent assaulted the complainant does not help the reader in arriving at a decision about the significance of the act and an appropriate outcome. A comment that the respondent assaulted the complainant by punching him in the jaw and causing the loss of three teeth is helpful. Another thing that is often missed in reports is a clear timeline of events.

Lastly, your report should be ruthlessly edited for sense and style. The writer should consider using a trusted colleague who will help to find typos and will push back on parts of the report that may be better worded or conclusions that are not supported within the report itself. I once had a report that I reread several times myself, had two different partners read and offer edit comments and the client still found a typo. If a report has a number of typos, spelling errors or remarks that cause confusion, it will also detract from the professionalism and reliability of the entire investigation.

If you would like to receive a sample investigation report, please contact me at the email below.

David Ray is Principal at Core Resolutions and can be reached via email at dave@coreresolutions.ca.

Counsel or No Counsel? Right to Counsel and OHS Investigations

OHS and criminal investigations not handled in the same manner

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Associate,
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Feature

We sometimes assume that parties to regulatory proceedings are entitled to have legal counsel throughout the regulatory process, including the investigation. A recent decision from Alberta examined whether occupational health and safety officers can request interviews with individuals without legal counsel and whether parties can be penalized for refusing to comply with such requests in the context of occupational health and safety investigations.

Administrative monetary penalties ("AMPs") were issued against Volker Stevin Contracting Ltd. ("VSC") and two of its employees for violating section 54 of the Alberta *Occupational Health and Safety Act (the "Act")*, which prohibits interference with an occupational health and safety officer who is exercising powers or performing duties or functions under the Act, following a workplace fatality.

Two employees of VSC were conducting inspections on storm drain catch basins in a residential area. The employees pulled their vehicle up to the storm drain and one of the employees got out to begin the inspections. As the work was underway, the employee in the vehicle saw another vehicle approaching and moved the truck, running over the other employee fatally injuring him.

Following the incident, an occupational health and safety officer contacted VSC and interviews were arranged with VSC employees at the VSC offices. When the officer attended the interviews, the employees were accompanied by counsel for VSC. The officer advised that counsel was not permitted to attend the interviews, relying on *Ebsworth v Alberta (Human Resources and Employment)*, 2005 ABQB 976 *("Ebsworth")*, in which the court found that occupational health and safety officers have jurisdiction to conduct interviews and investigations into incidents, determine the manner in which information regarding incidents is received and govern its own procedure, including the ability to exclude legal counsel from interviews. Counsel refused to allow the employees to be interviewed alone and the interviews did not proceed.

VSC was then served with letters requiring some of its employees to attend interviews at the offices of Alberta Occupational Health and Safety ("OHS"). The letters specified that the interviews would only be conducted with the individual employees in attendance. Counsel for VSC responded to the letters stating he was counsel for the VSC employees, alleging that OHS did not have the authority to require the VSC employees to attend the scheduled interviews and stating the VSC employees would not attend interviews without counsel present. The employees did not attend the interviews.

Following the interview attempts, OHS issued orders pursuant to section 59 of the Act requiring VSC employees to attend a videoconference interview and to allow for collection of information relating to the fatality pursuant to section 53(2) of the Act. Counsel for VSC advised OHS that it had been provided with all information that it was entitled to request, the VSC employees did not have any information that could be lawfully requested and OHS did not have lawful authority to interview the VSC employees.

OHS then contacted VSC senior management requesting contact information for the VSC employees without response. As a result, OHS began an investigation into whether VSC contravened section 54 of the Act by interfering with OHS' attempts to conduct interviews and whether an administrative penalty was a warranted result. OHS advised VSC employees of its authority to conduct interviews and collect information and explained the statutory immunity that would attach to any information they provided.

In response, counsel for VSC and the employees argued that the authority to conduct interviews, collect information and issue AMPs was unconstitutional. Following additional back and forth between OHS and counsel for VSC and the employees, and the continued refusal to be interviewed or provide additional information, OHS issued an AMP in the amount of $5,000 against VSC for contravening section 54 of the Act, prohibiting interference with an occupational health and safety officer exercising powers or performing duties under the Act. OHS also issued AMPs of $1,000 against each of the VSC employees for contravening section 53(2) of the Act, which requires any person present when an incident occurred or who has information relating to the incident to provide such information requested by an officer and failing to comply with an order issued under section 59 of the Act. The AMPs set out the basis for the penalties, the submissions received from counsel for VSC and the employees, the factors supporting the penalties and the rationale for the amount of each penalty.

continued next page...

Counsel or No Counsel? Right to Counsel and OHS Investigations

... concluded from page 6

VSC and the VSC employees appealed the issuance of the AMPs on a number of grounds:

- statutory provisions assessing AMPs are unconstitutional and violate the right to a fair trial before conviction or imposition of any penalty;
- there was no interference with the OHS officer by VSC and the employees did not have any information relating to the incident in question;
- OHS officers do not have the power to compel an interview;
- *Ebsworth* was overruled and does not apply in the circumstances;
- the AMP failed to identify a witness and is therefore void;
- VSC employees were not properly served with a demand to attend an interview and did not refuse to attend or provide information; and
- the penalty is inappropriate.

The Alberta Labour Relations Board reviewed the applicable statutory provisions and standard of review, finding that the applicable standard of review for all grounds of appeal with the exception of those raising constitutional issues was reasonableness. The Board dismissed the grounds of appeal regarding constitutional issues for failure to provide the requisite notice to the Attorney General of Canada and Minister of Justice and Solicitor General of Alberta.

In reviewing the grounds of appeal relating to the officer's powers and *Ebsworth*, the Board examined the *Ebsworth* decision, specifically portions of the decision regarding the *Charter* issue wherein Justice Verville found that OHS investigation interviews were not akin to interviews in a criminal investigation as the individual is not detained, there is no adversarial or coercive relationship between the state and the individual and therefore, sections 7 and 10 of the Charter were not engaged. Justice Verville found that an OHS investigation is similar to routine information gathering where the individual's liberty is not in jeopardy. The Board rejected the appellants' argument that *Ebsworth* was overruled on the basis that although the *Ebsworth* decision was appealed, the appeal was abandoned and it was reasonable for the OHS to rely on *Ebsworth*, which remained good law.

The Board also dismissed the grounds of appeal challenging the officer's authority to compel interviews, confirming that OHS officers do have a right to compel interviews without legal counsel in accordance with the principles in *Ebsworth*. With respect to whether VSC interfered with the investigation; whether VSC employees had information to provide; whether a proper demand for information was made; and whether VSC refused to provide information, the Board found that the OHS officer made reasonable findings of fact that VSC interfered with the investigation; VSC employees had information and proper demand was made for the information; and VSC employees refused to provide any information. The Board also rejected the argument that witnesses were not identified in the AMP, noting that this was not a requirement. Lastly, the Board considered whether the penalties were inappropriate. The Board found that the OHS officer properly considered the actions of VSC employees and VSC in determining the penalty and confirmed that the penalties imposed were appropriate and dismissed the appeal.

This decision serves as a reminder to employers and workers alike that OHS investigations can and do differ from criminal investigations and the rights afforded to parties are not always the same.

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Vaccinating Workplaces

Is your comprehensive vaccination policy in place?

Ruben Goulart
LL. B

Founder, Goulart Workplace Lawyers

Feature

With the steady increase of vaccination rates across the country, many employers have hope for a return to normal. For some, this will mean transitioning employees back to the office from remote work. For others, this will involve a more wide-scale reopening and recalling employees from layoff/leave. Whatever the situation, many employers are asking the same questions, especially on the topic of vaccinations.

Can we make vaccinations mandatory for our employees?

Under the Ontario Occupational Health and Safety Act, employers have a duty to take all reasonable precautions to protect the health and safety of their workers. Some have taken the position that this allows them to implement a mandatory vaccination policy, particularly when employees are required to work in close proximity to each other or a vulnerable population. In such circumstances, vaccination against COVID-19 is being declared an essential condition of employment, and employment contracts and policies are being updated to reflect this.

Having said that, without clear legislation or public health guidelines stating otherwise, it is unlikely that employers will be able to force employees to be vaccinated. Companies will have to be prepared to implement measures in the event that an employee cannot be or chooses not to be vaccinated. A comprehensive vaccination policy that addresses these situations and also provides employees with appropriate incentives and resources to promote vaccination will serve employers well in navigating the months to come.

What if an employee cannot or will not be vaccinated?

If an employee is unable to be vaccinated due to a medical reason, an employer has a duty to accommodate the individual under Ontario Human Rights Code. Appropriate accommodation may include ongoing use of personal protective equipment, modifying work duties, work from home or a leave of absence.

The Ontario Human Rights Commission has stated that a singular belief or personal preference against vaccinations does not appear to be protected under the Ontario Human Rights Code. Accordingly, if an employee chooses not to be vaccinated due to their personal preference, the Company does not have an obligation to accommodate them. Nevertheless, in most situations, an employer could undertake to find a non-disciplinary alternative to vaccination. A comprehensive vaccination policy should reserve the right to take the necessary steps to protect the health and safety of its workers if an employee refuses to receive the COVID-19 vaccine. This may include modifying work duties, a leave of absence or the cessation of the employment relationship.

Can we ask for proof of vaccination?

An employee's medical information is private and generally considered confidential. However, an employer could have a right to such information when necessary for a bona fide occupational reason. In the present circumstances, employers have a genuine reason for requesting the vaccination status of their employees. However, employers must take all reasonable steps to ensure that this information is maintained in a secure and confidential manner. The employer must not share the vaccination status of its employees without their written consent, unless required by law. The medical information must also be destroyed as soon as the information is no longer necessary in accordance with applicable privacy legislation.

Ruben Goulart is the founder of the firm Goulart Workplace Lawyers and can be reached via email at rgoulart@goulartlawyers.ca.

Mandatory Vaccinations: Employers' Pressing Questions

Proceed with caution when making the rules

Tom Ross
Q.C.

Partner,
McLennan Ross LLP

Ask the Expert

With the emergence of new COVID variants, the new restrictions that started September 16, 2021 in Alberta and the growing discussion of mandatory vaccination, employers and employees are struggling to figure out their respective rights, entitlements and obligations in protecting against the spread of COVID-19 in the workplace.

We have seen commentary suggesting that employers have an elevated duty with respect to COVID-19 over and above the general obligation to keep their workplace safe and free from hazardous substances. We believe some of these concerns are overstated. A distinction must be drawn between employers introducing a hazardous substance in the workplace and a hazardous substance being brought into the workplace through no fault of the employer.

Below is an overview of some of the questions being asked by employers. As all circumstances are fact specific, legal guidance should be obtained when implementing plans.

If government COVID-19 protocols are removed, do employers continue to have any obligation to their employees with respect to the possible spread of COVID-19?

Employers have a general obligation to provide employees with a safe workplace. This obligation does not mean employers guarantee an employee will not contract COVID-19 at work, or any other illness for that matter. If an employer did not cause the illness to be in the workplace, it is unlikely an employer would be liable for an employee bringing COVID-19 to work and infecting other employees. An employer does not have a positive obligation to prevent every possible risk of COVID-19 entering the workplace. Employers have an obligation to identify hazards in the workplace and take reasonable steps to manage and reduce them.

What are the risks to employers of mandatory vaccination programs?

There are different legal risks associated with mandatory vaccination. First, there are privacy law issues and the risk of a privacy complaint. Second, there are human rights risks, though these can be addressed by accommodating employees who have a protected basis for refusing vaccination, such as disability or religious belief. Third, for non-union employees, there is a risk of constructive dismissal claims. Fourth, for union employees, there is a risk of grievances alleging that the mandatory vaccination requirement is unreasonable or contrary to the collective agreement. There are also practical risks, including how such programs impact employee morale, recruitment and retention.

What can an employer do to keep the workplace free from COVID-19?

Again, each workplace is fact specific. Although an employer has no current obligation to do anything specific, it is probably in an employer's best interest to have protocols in place to assure its employees that they are working in a safe environment.

Employers may want to ask their employees if they have been vaccinated. There are clear privacy considerations in requesting such medical information and whether it is legitimately required for safe operation. If the request for vaccination status is in order to require the employee to get vaccinated, it is not clear whether that purpose is reasonable.

Truly voluntary disclosure can be tracked, but the personal information must still be safeguarded. Anonymous employee surveys of vaccination status are also acceptable.

If an employer believes it needs to implement individual protocols, it should address its mind to whether it needs to request vaccination status or whether it can appropriately mitigate the risk of spreading COVID-19 through other means, such as working from home, mandatory mask requirements or social distancing. A relevant consideration will be how the employer has managed such risks throughout the pandemic.

Employers should also consider whether there are greater risks of COVID-19 within their operations. The greater the risks, the more an employer may be entitled to do.

Can employees refuse to attend work if an employer does not require mandatory vaccination for all employees?

Employees are entitled to refuse work that is dangerous. Although fact specific, it is doubtful whether the failure to mandate vaccinations creates a dangerous workplace. As such, employers should be able to require employees to attend work, even if there is not a mandatory vaccination program in place. This issue, however, is fact specific. Relevant to this question would be the presence of any added risks and the ability to work safely in that workplace during the pandemic (without mandatory vaccinations).

Can employees refuse to come to work and choose to work from home if they were able to do so during the pandemic?

Though employers are generally entitled to determine the place of work, given the recent Alberta government announcement that mandatory work-from-home measures are in place unless the employer has determined a physical presence is required for operational effectiveness, working from home will be required for many workplaces regardless of an employer's preference. It is a reasonable option for many employees, especially if they have been working from home earlier in the pandemic.

Are employees entitled to WCB coverage if they experience an adverse reaction to a COVID-19 vaccine?

The Alberta Workers' Compensation Board has stated, "If a worker has an adverse reaction to a COVID-19 vaccination, they are entitled to compensation when the immunization is a mandatory condition of employment."

Conclusion

The topic of mandatory vaccination is sensitive and evolving. Employers should consider the issues in their operations, as well as the need, risks, philosophy and values associated with mandatory vaccination. Caution is required. Any program should be carefully tailored to follow all public health guidance and also reflect the individual circumstances in each place of employment.

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

Ontario Superior Court of Justice: Right to Terminate Without Notice

New hope for employers for "Just Cause" termination provision

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Odessa O'Dell
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Associate, Borden Ladner Gervais LLP

Feature

In a breath of fresh air for employers, the Ontario Superior Court of Justice recently rendered a notable decision in *Rahman v Cannon Design Architecture Inc.*, 2021 ONSC 5961, which held that "just cause" termination provisions may not always be void and that the validity of such a provision may depend on the factual situation.

The Facts

On February 16, 2016, the plaintiff, Ms. Rahman, entered into an employment agreement with the defendant, Cannon Design Architecture Inc. ("Cannon"). Prior to finalizing her employment, Cannon provided Ms. Rahman with an offer letter that outlined the specific details of her offer of employment, as well as an "Officer's Agreement" which provided a more generalized policy document.

The termination provisions in the Officer's Agreement and the offer letter varied, however, the letter stated that in the event of a discrepancy between the two documents, the offer letter prevails. The offer letter stated "Cannon Design maintains the right to terminate your employment at any time and without notice or payment in lieu thereof, if you engage in conduct that constitutes just cause for summary dismissal." Further, the offer letter stated that the payments Ms. Rahman was to receive on termination would be no less than the minimum amounts required under the *Ontario Employment Standards Act, 2000* (the "ESA") even if the Officer's Agreement might purport in some circumstances to provide for a lower payment.

Prior to accepting the offer of employment, Ms. Rahman sought independent legal advice with respect to the offer letter and specifically the termination provisions. Further, Ms. Rahman negotiated various elements of her employment with the defendant prior to accepting the position. While some of Ms. Rahman's proposed changes were not implemented, Cannon did amend the offer letter to include an enhanced benefit of two months' notice in the event of termination by the Company within the first five years of employment, conditional upon receipt of a release.

Due to COVID-19, Cannon instituted enterprise-wide lay-offs and salary reductions, which resulted in a 10% reduction of Ms. Rahman's salary, beginning on April 6, 2020. On April 30, 2020, Ms. Rahman's employment was terminated. No cause was alleged and a new hire replaced Ms. Rahman's position.

The Plaintiff's Position

Ms. Rahman sought a summary judgment and argued that the termination provision of this employment agreement "is entirely unenforceable because the 'just cause' termination provision would permit termination without notice in circumstances broader than those contemplated by the ESA." Given the issue with the 'just cause' termination provision, Ms. Rahman argued that the entire termination clause was void and unenforceable.

The Decision

The court held that the offer letter provided clear and unambiguous terms in two separate sentences and that the minimum ESA standards would be upheld. Further, the court noted that if any discrepancies existed between the offer letter and the Officer's Agreement, the former should govern, which signaled again that at the very least the minimum ESA standards are required. Additionally, the Court was reluctant to find the termination clause void, given that Ms. Rahman entered into this contract with a relatively equal bargaining position and received independent legal advice that explained differences between the Officer's Agreement and the offer letter.

Takeaways for Employers

Although the court signaled that "just cause" terminations are not always detrimental to an employment agreement, this decision has already received judicial criticism, and may not be applicable in all situations given the unique facts of this dispute. However, this decision is significant because it raised three key points for employers to consider when drafting and engaging with termination clauses in employment contracts.

First, this decision signaled that not all employment agreements that include "just cause" language in termination provision are, in themselves, detrimental to an otherwise valid termination provision. In deciding whether to uphold such a termination provision, the court may look to the sophistication of the parties, whether independent legal advice was obtained, and whether the provisions meet or exceed ESA standards.

Second, as noted above, employers should consider an employee's ability to receive independent legal advice prior to engaging in an employment agreement. Ms. Rahman's decision to receive legal advice played a significant role in saving the "just cause" provision within the offer letter. Specifically, since Ms. Rahman did receive legal advice and negotiated elements of her employment agreement, the court noted that any inequity in bargaining power between the parties was equalized.

Finally, this decision signalled that courts are willing to move towards true contract principles in employment disputes and that the courts are able to reject arguments that a just cause termination provision attempts to contract out of the ESA.

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Motivational Leaders: Mastering the "C Sweet"

The recipe for success on making the difference

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Next Stage Equine Facilitated Coaching

Feature

If you are a middle manager, you have a really tough job. You are among the many if you were promoted without any professional development to help your transition into the world of management and dealing with people. Managers are the meat in the middle of the sandwich stuck between higher ups who want productivity and results and employees who want to make a meaningful contribution in a healthy workplace. Employees expect a lot from their managers. Some managers are very successful in building strong results-oriented, satisfied teams. How do they do it?

First, they start with an understanding of who they are and how they show up in their role. They are motivational leaders. They rigorously practice what I call the C Sweet. The C Sweet is a way of being and includes caring, compassion, courage and conviction, clarity, communication and conversation. This way of being produces confidence and competence. Confidence and competence produce results.

Highly effective leaders work on themselves first. Daniel Goleman, the author of *Emotional Intelligence* says: "The ability to manage yourself – to have self-awareness and self-regulation – is the very basis of managing others, in many ways. For instance, science has found that if you are tuned out of your own emotions, you will be poor at reading them in other people. And if you can't fine-tune your own actions – keeping yourself from blowing up or falling to pieces, marshalling positive drives – you'll be poor at handling the people you deal with. Star leaders are stars at leading themselves, first."

Through every interaction we create an impact. Sometimes it is a positive one- other times not. The opportunity is in discovering our unintended impact. How do we present to others? How do we know what others think of us and our leadership? Are they with us because they want to be or because they perceive no other choice? What strategies can we use to find out?

Here's a simple way to find out. Ask only four questions. These are known as **keep; tweak; stop and start.** Ask your staff or have someone ask them and anonymously present you with the results.

Considering my management style:

1. What do I do that I need to keep doing because it works and adds value to our relationship?
2. What do I do that is a good idea but needs tweaking because my delivery falls short?
3. What do I do that I should stop because it is not value added and may actually do more harm than good?
4. What am I not doing that I should start because it would really make a positive difference?

Depending on your ability to lead and manage people, your employees may not want to answer these questions directly. This is when we reach out for help because to be effective, we need the answers. Then we need to work on a plan to develop the stuff that surprises us. Changed behaviour comes first from the courage to ask the questions and then the desire to make a difference. We need to be self-aware, exhibit self-control and self-mastery.

There are a few other characteristics that make a significant difference. We'll start with **caring**. Caring means to start with the heart. Managers keenly involved in team building who are collaborative and can create ground rules for behaviour go a long way in building a supportive and trusting culture. Caring also means holding people capable. It does not mean micromanaging. It means enabling people to be responsible and accountable by giving them the autonomy and flexibility in their work. Caring managers treat employees as adults who know what to do, how to do it and when they need to deliver. If they don't, then the culture of trust and support enables them to ask in a way that creates and inspires their growth.

Successful managers live **compassion**. Compassion helps shape how employees think of you as a leader and influences the lengths they are willing to go for you. It's not hard to be compassionate in the face of catastrophic life events. That's not only what this is about. Compassion for the small stuff is also important. All too often, this is met with resistance from the manager. Saying no to the employee in difficult circumstances is not forgotten when the moment passes. It sets a tone for the relationship. If you say no to the special requests, this shows you are not receptive when someone needs a break - not the thing trust is made of.

Courage and conviction are game changers. All too often, courage means truth to power. It means going against the grain. It's often out on a limb saying the hard thing that needs to be said for the sake of the greater good. True conviction is sometimes tough. It is the state or appearance of being convinced; a fixed or firmly held belief, opinion; and the act of convincing. How do we strike the balance between believing you are right and sticking with it and not alienating others in the process? It is a fine but critical

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line. Successful managers are courageous and speak with conviction and humility. They deal in facts and invite others into the conversation. They also listen with heart.

Motivational leaders know how to **communicate**. They think of their communication skill like a muscle- the muscle of communication. They are exercising the muscle to develop it all the time. They also know what to communicate. They are present to others. They find the time to say hello to their staff. They engage in small talk about what matters to their employees. They get to know people on a personal level.

Another take on communication is conversation. Sometimes, we need the soft skill of communication to do the hard skill of conversation. This is where empathy, clarity and conciseness are key. Motivational leaders are **clear**. They take the guesswork out of it. They put as much energy into what they want for the other person as they do thinking about what they want for themselves. They are other-centred - they behave in such a way as to promote the good of others rather than their own good.

Finally, motivational leaders demonstrate **confidence and competence**. This is not about knowing it all and coming across as arrogant. It is about being confident and competent in your dealings with people and trusting that the answers are in the room. It is about coming up with the right questions to coach and coax people out of their comfort zones, take risk and grow. It's growing with them.

In summary, we start with caring. Through our caring, we can show compassion. Our demonstration of compassion enables courage. When we have courage and can strike the balance with conviction, we can communicate. When we master communication, we are able to have the hard conversations in a respectful, caring and compassionate way. When we have the hard conversations with care and clarity, we build confidence and competence both in ourselves and others. Motivational leadership **starts and ends with the consciousness of self**. Now ask yourself what you are doing to master your contribution as a motivational leader. When you work on yourself first, then you can truly motivate and lead others.

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Staying Tough in Tough Times

Will this one ever come to an end?

It's now well over two years in the midst of the global pandemic. So many people have lost their jobs and are finding nowhere to turn. A multitude of businesses shut their doors as they could not survive. Major downtown centres across Canada are facing the largest vacancy in decades and everything is being affected.

This article is not intended to be doom and gloom. The tough times always pass. The intent is to focus on leadership and how to be tough. I really think that leaders should not wait for tough times to then get "tough." Even in more affluent times, it is necessary to be tough and continue to grow. So, what does it mean to be "tough"?

I met with a young retired CEO of a very successful oil and gas supply company who had been a client for 20 years. I asked him, "Now that you can look back more objectively, what would you do differently with your company, if you could do it over?" His reply came quickly- he said that the number one thing was that he would have worked harder on the culture of the company.

It is really no different than being a parent. If things are going well – the kids are getting good grades, not getting into trouble – does that mean you loosen the rules and the purse strings, or do you continue to show respect, care and love to ensure things keep going well? The same thing happens with organizations – leaders must keep a thick skin and be "tough" through both good and bad times. Focusing on the culture is a must.

Exactly what does "being tough" look like? Here are six key ingredients:

1. **Be crystal clear on the corporate values.** This determines the culture you want and gives you a transparent sounding board for all decisions. These should be aligned with your personal values. Otherwise, you are working for the wrong organization.
2. **Keep a positive attitude.** Your attitude is determined by you, not others. It also affects expectations and behaviours of everyone you lead. Be grateful no matter what – this will strengthen all positive emotions and allow you to control negative emotions like anger. Remember that it is impossible to be grateful and negative at the same time.
3. **Take a hard look at your people smarts (emotional intelligence).** There are always areas to improve and this will help your people stay focused and engaged.
4. **Be prepared.** It's the boy scout motto. This means thinking ahead on how you will communicate tough decisions. It will also help you set goals that are focused on growing the company, no matter what.
5. **Be driven and humble at the same time.** Driven does not mean being a bulldozer and humble does not mean being a pushover. It does mean, however, sticking to the plan and listening to what your company is telling you.
6. **Focus your energy on what you can improve.** Waiting for commodity prices to turn around is futile. Looking at what you can control is smart – and tough.

"And once the storm is over, you won't remember how you made it through, how you managed to survive. You won't even be sure, whether the storm is really over. But one thing is certain. When you come out of the storm, you won't be the same person who walked in. That's what this storm's all about."
Haruki Murakami

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Feature

Welcome to the New Neighbourhood

Managing the multi-generational workplace

Members Quarterly Staff Writer

Feature

Your workplace is likely the most generationally diverse it has ever been- five generations operating under the same roof. How do you get these different generations, each with their own unique attitudes about life, living and work, to get along and work together? Let's look at how to facilitate cooperation and maximize productivity.

Traditionalists

Traditionalists, the veterans, grew up during the Great Depression and their focus is on security and maintaining what they have. They are some of the most loyal and dedicated workers. Many have been with the same employer throughout their entire career. This mentality can stand in pretty stark contrast to the younger generations brought into the workforce as freelancers or contractors. Nevertheless, great things can happen when employees with vastly different perspectives are brought together. Encourage younger workers to tap into their traditionalist colleagues' wisdom and appreciate what they can learn from their experiences. The technological gap may be hard to bridge with traditionalists, so it is essential that every team member has a good handle on any software or communication app being used.

Baby Boomers

Baby boomers place a high value on promotions, raises, awards and achievements. They also tend to be more reserved and inclined to work more independently than their younger colleagues who were taught to think in a collaborative framework. Managers must take a targeted approach to foster healthy communication between baby boomers and the rest of the team. This is a large and diverse group who won't take well to being stereotyped, especially if it's coming from a younger co-worker or manager. Management must stay engaged and appreciate that though baby boomers as a whole may prefer autonomy, some want a more hands-on approach. They may also be less comfortable airing some of the grievances that younger generations won't tolerate. You must pay attention to spot their hidden gripes and address them individually.

Generation X

Generation X is likely to try to outperform the previous generation as this group wants to move up in the organization quickly. They often need some career path or progression to be happy at work. They perform best when their education is recognized and rewarded and when there is regular and moderate change. Holding reviews regularly will help keep this group engaged and feeling appreciated. Brief sessions to touch base or surveys can also be a great way to understand

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this group. They are typically keen to demonstrate their grasp on technology and are open to embracing new software. That being said, they likely retain a preference for independent work and appreciate projects in which the various responsibilities and expectations are delineated for each member.

Millennials

This generation grew up with both parents working outside of the home. They are used to spending time alone which has helped them develop independence and self-sufficiency as significant character traits. This group is entirely comfortable with technology and has great adaptability for change. They also place a high value on a work-life balance and expect more flexibility and trust from an employer. The use of time tracking and job scheduling software here allows all team members to appreciate each other's contributions, even if they have different work habits.

Generation Z

This group has now arrived into the workplace. They value their social network and are looking to have experiences at work that will allow them to develop and grow. They are most diverse and have been given the broader parameters to imagine what work can be like. When tapping into the unique skillsets and technological prowess of Gen Z, remember that there is no one-size-fits-all approach. Gen Z will expect that their managers and co-workers will get to know their motivations and learning styles to find out what works and what doesn't. They need to be reminded of the different habits of other generations. Managers should pair them with colleagues who have strong communication skills and with whom they'll feel comfortable asking questions and learning workplace etiquette.

How Does All This Work?

Managers have a responsibility to be interpreters and translators between the generations. They must develop solid communication systems to hear all complaints and to smooth out the rough spots. Organizations will have to find a balance that respects the generational diversity of these times. This means building on each generation's strengths and showing flexibility in how they reward and recognize employees at various stages of their working lives.

The best thing that managers can do is learn about the individuals working for them and stay engaged with the changing needs and workplace dynamics. The more you know about your team, the more effectively you can monitor, engage, motivate and challenge them. This allows you to create trust and build a bond so that your employees can perform at their best without disrupting the rest of the team.

Members Quarterly Staff Writer

WDYT?

Send us your feedback and suggestions for articles.

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