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SUMMER 2021 VOLUME 19, NO. 3

Nathaly Pinchuk
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Perspective

What's Your Emotional Intelligence (EQ) Score?

Which is more important – EQ or IQ?

We all like to believe that we're smart, but what's our emotional intelligence score? Emotional intelligence is your ability to empathize with others. It distinguishes the star performers from the mediocre. In the midst of this pandemic, we should empathize now more than ever. The good news about emotional intelligence is that although we may not have been born with it, it can be learned and even mastered with practice.

There's a whole language around emotional intelligence which many may not realize. It rates people's emotional intelligence on a scale that ranges from something called 'spongy' to 'unaware'. I think we know what unaware looks like, but what is spongy? A spongy person is highly emotionally aware and can usually feel and recognize a wide range of emotions. This is not always good in the workplace as it means these people can take on the emotional weight of others. It actually sounds like a bit of a burden.

At the bottom end of the scale are the unawares. These people seem to have few emotions they can recognize or name. If you ask them how they are today, it's almost always fine. Just to be clear, fine is a descriptor — not an emotion. They also don't pick up the social cues that others may be upset with them until the situation blows up. This doesn't make for a very healthy workplace either.

Fortunately, most of us are in the middle zone of emotional intelligence. Some experts call us the 'non-stick' people. We (myself included) can recognize our own emotions and see them happening in others. We just don't pay much attention to them. The problem with this approach is that we non-sticky people appear as though we are not empathetic enough, or that we don't seem to care when someone around us is in emotional distress.

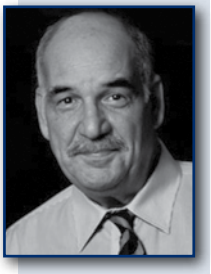
Some people may ask why we care about emotional intelligence anyway. What we've found in the last twenty-five years since the release of Daniel Goleman's book *Emotional Intelligence: Why It Can Matter More Than IQ* is that emotional competence can have a positive effect on the modern workplace and on the bottom line. Research has shown that it helps workers interact with others better and this reduces stress, anxiety and conflict. In turn, engagement and productivity show marked increases once the workers become more emotionally intelligent.

These are good reasons to pay attention to emotional intelligence. For managers and supervisors, improving your emotional intelligence will not just make you easier to get along with, but there are other tangible benefits. These include helping you make better decisions and improve your problem-solving techniques. You can also keep your cool under pressure. Once you have greater empathy, you will also be able to diffuse and resolve conflict much more efficiently and effectively.

What can we do to improve our emotional intelligence? The good news as noted above is that no matter where we start on the scale, we can all get better. The first way to improve becoming more empathetic at work is by reading or rereading Daniel Goleman's book. It provides extensive information on the topic as well as insights on how to master the skills.

Numerous resources available online and in print suggest doing some work and practice on yourself in order to get better at feeling and recognizing emotions. Activities like journaling seem to help many people as well as using your physical sensations to start recognizing your emotions. Your body will often signal to you when you are anxious or worried. That could come as a headache or a pain in your stomach. As you improve, you may even start to feel your stomach tightening as a sign of tension or stress that is just beginning. This is when you realize that you may be improving your emotional intelligence score.

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



Brian W. Pascal
RPR, CMP, RPT
President

President's Message

It's Okay to Ask for Help

Don't let the small bushfire become a major wildfire

Asking for help can be frightening to so many people. It really shouldn't be, but it is.

Whether this has to do with pride, fear of appearing incompetent or perhaps not even knowing where to begin, it's a tough obstacle to overcome. It affects everyone, regardless of where you are in the corporate food chain. The problem is that this reluctance can often allow a small issue to become something big, especially at work.

Take a moment to appreciate that even the employee of the month or the top performer on your team encounters all sorts of things they need assistance with. What separates them from the rest of the pack is that instead of wasting valuable time in a state of confusion and anxiety, they will often seek help to address a problem they can't quickly figure out on their own.

The top performers have learned that nine times out of ten, no one is even going to remember that they asked for help, and what may be a matter of answering a simple question for others could save them a major headache. They know it's far better to ask for help and accomplish the task successfully and on time, rather than muddling about or not being able to finish it at all.

Besides, who wants to get stuck in that state of not knowing or feeling overwhelmed? It instantly fires up your stress levels and only increases the anxiety of everyone around you. If you suddenly realize that you took on too much or made a mistake, just step back, take a breath and tell yourself it is alright. It happens to the best of us and no one is going to fault you for owning up to it.

If you suddenly realize that you took on too much or made a mistake, just step back, take a breath and tell yourself it is alright.

Likewise, if you feel you've received inadequate instructions to complete a task, don't be shy about asking for clarification or further detail. We've all dealt with a boss who assumes their subordinates are mind readers and that they will automatically know exactly what is needed of them. So, forego the ego and just raise your voice to ask for help or clarification. You will see firsthand how much smoother things will go.

This is for the routine, everyday stuff at work. If you have a more serious problem at the workplace, you must treat it like an emergency and call in an expert. No one will mind getting an extra call for help. They will certainly be far more upset if that small bushfire turns into a wildfire. The first question you will be asked is why didn't you ask for help.

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

INSIDE THIS ISSUE

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Accepting the New Reality with Termination Clauses

The changed contractual reality for employers in Ontario

Feature

It's now official. The Court of Appeal's decision in *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 will not be heard by the Supreme Court of Canada. The case remains the leading authority for interpreting termination provisions in employment agreements in Ontario.

Let's start with the concept confirmed by the Court of Appeal in this case: termination provisions must be interpreted organically as one entire working element. If one part of the clause violates the law, the whole clause is in jeopardy and no "severability" provision will save it.

Termination clauses have three main parts: resignation, termination without cause and termination for cause (after probationary period). The key element in this case was the "just cause" provision. Most agreements say that in the event of just cause, an employer may terminate without notice or pay in lieu of notice — the employee is paid nothing except whatever is owing to the date of notice, including accrued vacation pay.

But here's the problem identified by the Court: the only way to deprive an employee of notice or pay in lieu of notice under the *Ontario Employment Standards Act, 2000* (the Act) is for "wilful misconduct, neglect and disobedience". This is a higher standard, so the traditional "just cause" provision has the potential to violate the *Act*, with the fundamental finding that just cause and wilful misconduct are not the same thing. The entire provision may therefore be in violation of the *Act*. The employer is then left with an unenforceable clause with termination subject to common law notice or payment in lieu of notice.

This is especially problematic if the agreement provides for the payment of only statutory minimum termination amounts under the *Act*. For now, this appears to be a problem only for Ontario employers.

How do employers fix this? It is not easy for existing employees who have already signed agreements with the more traditional just cause language. Here are a few suggestions:

1. If the employer is terminating an employee who is subject to a problematic clause, consider offering a package that is more than the amount prescribed — but ask for a release. This is especially important if the contract provides for only statutory minimum notice and severance in the event of termination without cause. The extra amount should have regard to common law notice, especially if it is determined that the existing termination provision is truly problematic.
2. The existing agreement template should be reviewed and updated. While at it, carefully review the bonus provisions, given more changes outlined by the Supreme Court of Canada late last year on the topic of bonuses payable over the notice period. Finalize the template and use it for all new hires as soon as possible.
3. For existing employees who have already signed a problematic agreement, the key question is whether to have them sign a new and improved one. There is no right or wrong answer, as having existing employees sign new agreements is fraught with risk, as outlined below. However, under certain circumstances, a new agreement should be introduced.
4. Consideration is key for existing employees to sign a new employment agreement. In order to be binding, every employment agreement needs consideration — the bargain that flows between the parties in order to support the obligations in the agreement. This is the challenge with having existing employees sign an agreement mid-employment — they already work for the company. It is easy with new employees, as the bargain is the job itself as long as the agreement is signed before the new employee starts. But what do existing employees get as consideration? In such a case, classic consideration would include a promotion or changes to compensation which are not in the ordinary course. For example, the introduction of a new commission or bonus plan. This means that an employer may just have to wait for the opportunity to have new agreements signed and implement the new form on a gradual basis.

What if the employer wishes to have a new contract signed as soon as possible? This is the hardest question of all. Typically, our advice is to provide a signing bonus in such cases, in an amount that recognizes what the employee is being asked to give up.

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Michelle Phaneuf
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Ask the Expert

Managing the Successful Return to Office

Getting everyone on board after the lockdowns

Q My employer has just advised that we are all expected to return to the office following the lockdowns. How do we navigate this change?

A We know that the pandemic has created stress and uncertainty for us all over the last year and a half. Our worlds have been turned upside down not only work wise, but personally as well. Those who are introverted may have appreciated many aspects of working from home while those who are extroverted struggled with lack of interaction during this period of isolation. Studies have shown that not only extroverts, but those displaying introversion experienced more severe loneliness, anxiety and depression due to COVID19-related circumstantial changes. Morneau Shepell reflects this in their monthly Mental Health Index that shows the strained mental health in the Canadian population recorded monthly since the pandemic began. With vaccines now available, the mandate to return to the workplace is not that far off. Employers and employees need to recognize that the toll on employees' mental health will impact their return to the workplace and their ability to manage working relationships successfully.

When your employer has indicated it's time to return to the workplace, what will you do? It's a good time for a conversation and maybe a negotiation with your employer by asking some questions ourselves. When is the right time to go back? Is the employer telling me to return or do I have a choice? What am I going back into? How will it work? Can I go back full-time or will they let me have a flexible working arrangement? The working relationship with our employer is also one of our most important ones, so a natural place to begin our efforts.

Our worlds have been turned upside down not only work wise, but personally as well.

We will again find ourselves in the position of having to redesign the way we work as the pre-pandemic ways won't be suitable for some time to come yet, if at all. We will continue to have to adapt to constant change and uncertainty; feeling our way as we have during the past fifteen months. What will our new social norms be? We can't fathom that shaking hands or hugging will be on the near horizon, so maybe that awkward elbow bump will become a new standard of greeting. How will we collaborate differently? Virtual collaboration was becoming easier and now we will likely have to adapt to a mixed undertaking of virtual and in-person. Some individuals in the room and some on video, or some meetings with everyone gathered in person and some virtual touch points. We've done so well without travel so maybe that will continue to ensure organizations can manage costs. Returning to our own travel or commuting may also create some strain so remember to build back in the time — we've become used to a short commute when working from home.

In many cases during lockdown, we were able to get to know our colleagues better through our video glimpses into their homes. You can tell a lot about a person by viewing the art on their walls, their pets and of course meeting their house mates, whether that is small children interrupting or spouses in the background. Perhaps our previous in-office working relationships were targeted to those we felt safe to interact with or those we knew we had things in common with. Returning to the office will give us the opportunity to strengthen these newer, broader working relationships that began through our video connections. This may be more difficult for those introverts mentioned earlier and welcomed with open arms by the extroverts. Regardless of which category you may fall into, a focus on building and restoring our working relationships will be vital so ensure you set aside time in your day to reconnect in person. Stress and anxiety will be higher for all of us, but we can use those pandemic video connections as a foundation to build strong working relationships. These relationships will be what keeps us grounded and able to thrive during our return to the office.

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Recruiting 101: The Job Interview

Improper questions or discussion lead to discrimination charges

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Feature

One of the greatest tools in an employer's arsenal during the recruitment process is the job interview. While this may be the golden opportunity to get face to face with a potential hire, it remains important for employers to proceed with caution.

The fundamentals

Employers should be implementing a recruitment process that is fair and objective. These measures should be the basis for all aspects of hiring — from the job posting through to the interview and offer of employment.

When preparing for the interview portion of the hiring process, best practices include:

- Develop standard questions in advance, complete with an answer guide of desired responses. Questions should be based on the essential duties and requirements of the job in question.
- Assemble a multi-person panel to conduct the interviews. More than one individual should conduct the interview to ward off bias and promote objective evaluation of the candidates.
- Ensure that all of the candidates are asked the same questions. Similarly, if there are any written tests to be completed as part of the hiring process, each candidate should receive the same test and be objectively marked.

These best practices help to ensure that a candidate's success in the recruitment process is not dictated by informal or subjective assessment on the part of an interviewer. When decisions are made on informal processes, there is a much higher risk of unconscious bias sneaking into the hiring process.

Inappropriate interview questions

Employers must take special care not to ask questions relating to prohibited grounds as set out in human rights legislation. Questions that must be avoided include those concerning:

- Age
- Ancestry, place of origin and citizenship;
- Race or ethnic origin:
- Creed (including religion and beliefs)
- Sex, sexual orientation, gender identity and/or gender expression;
- Family or marital status;
- Disability; and
- Record of offence.

There is serious risk associated with these types of questions. Specifically, the presence of these improper questions can be enough to infer that a decision to hire was influenced by such a question. In these situations, employers can face a finding of discrimination even if they had no intention of doing so.

Limited exceptions

There are very limited exceptions to questions that can be asked that would directly or indirectly identify an individual based on a prohibited ground.

Employers are permitted to inquire as to whether a candidate is eligible to work in Canada. The question should be as simple as "Are you legally able to work in Canada?" Direct questions regarding country of origin, ethnicity or citizenship should generally be avoided.

Another exception might be where the hiring practice has a discriminatory effect, but is necessary to screen for essential duties/tasks that are required for the job. For example, if a female security guard is needed in order to perform same-gender body searches, hiring practices that eliminate male applicants may qualify as a bona fide occupational requirement and therefore be permissible.

Finally, questions related to prohibited grounds might be permissible where it is a reasonable requirement for a special interest organization. An example of this might be where the employer serves a particular religious group such that the candidate having the same religious affiliation might be a reasonable and genuine qualification.

What if the candidate brings it up?

Sometimes, a candidate might bring up information when answering a question that volunteers information under protected grounds. For example, a candidate might be discussing their ability to multi-task as a particular strength and reference their husband in the example they provide.

In normal conversations, the fact that someone mentions a spouse might lead to a number of follow up questions: What does your spouse do? How long

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Feature

Recruiting 101: The Job Interview

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have you been married? Do you have any children?

While these questions might seem innocent enough, they should not be pursued. After all, the answers to these questions might include additional information pertaining to family status or even sexual orientation, areas which fall under human rights and are thus prohibited.

So, what should you do if these topics inadvertently arise?

Let the candidate finish answering their question and simply move on to the next question on your list. In other words, don't get caught up in the natural temptation to follow up!

Finally, after the interview, be mindful of how human rights-related information that might have inadvertently been disclosed factors into the evaluation of the candidates. This is where the grading scheme associated with each standard question is particularly useful. Omit the information relating to prohibited ground and instead focus on the other elements of the candidate's response that fit into the grading scheme for that question.

Takeaways for Employers

Employers should ensure they are well-prepared for the interview process. The creation of standardized questions in advance minimizes the risk of improper questions, which in turn minimizes the risk of subjective hiring decisions that can lead to allegations of discrimination.

Where an employer might be recruiting for a position that may have specific requirements such that there may be exceptions to what can be asked in the interview process, legal advice is recommended to ensure that it is done properly and with minimal risk.

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I Spy: Dismissal for Surreptitious Video Recording Upheld

Employee terminated with cause for taking secret videos of customer

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Feature

Technological advancements have allowed us to capture and broadcast moments in time easier than ever before. Cameras in computers and cellphones are the norm and can be useful tools in many workplaces. What happens when those tools are used for other purposes? What kind of expectation of privacy do we have? The Court of Queen's Bench in New Brunswick shed some light on these issues in the context of a wrongful dismissal claim in *Durant v Aviation A. Auto Inc. (Audi Moncton)*, 2019 NBQB 214 (CanLII).

Robert Durant, former service advisor with Audi Moncton, brought an action for damages for wrongful dismissal against Audi Moncton following the termination of his employment for cause. Mr. Durant's employment of 34 years was terminated for cause following an incident in which Mr. Durant took video and a photo of a female client at the workplace using an employer-issued tablet without the client's knowledge or consent and showed the video and photo to coworkers.

A female client attended the dealership to have the oil change indicator light on her vehicle reset. Mr. Durant's coworker was assisting the female client when Mr. Durant used his work-supplied tablet to take a photo and two (2) videos of the female client. Mr. Durant subsequently made another video using his personal cellphone of the video he had taken using the tablet. Mr. Durant proceeded to show the video to a number of his coworkers at work while making inappropriate references to the client and sent the photo to one of his coworkers.

The incident was reported to senior management and human resources. Audi investigated the incident, interviewing Mr. Durant and his colleagues. During the investigation, the two videos and the photo were found on Mr. Durant's company tablet in the "recycle bin". Mr. Durant admitted to making the video and explained that he took the video as a joke because the client was dressed inappropriately and that he did not feel he did anything wrong as the video was no different than the security cameras present in the workplace. The investigation further revealed that Mr. Durant had taken photos of female clients without their knowledge or consent in the past by placing his cellphone in the breast pocket of his shirt with the camera facing outward and showing the photos to his coworkers. Mr. Durant was disciplined in the past for this misconduct as well as making an inappropriate comment to a female client on another occasion. Following the investigation, Audi terminated Mr. Durant's employment for cause for taking the videos and photo, sharing them with coworkers and for past misconduct.

Mr. Durant commenced a claim against Audi for damages for wrongful dismissal. Both parties sought summary judgment. In the proceedings, Mr. Durant alleged that he took the videos and photo of the female client because he was concerned that the female client was intoxicated by drugs or alcohol because she moved rapidly, appeared animated and was dressed in an inappropriate manner. He also said that he made the video as a precautionary measure in order to protect

Audi employees from any potential unfounded claims of inappropriate behaviour by the client.

After determining that the matter could be properly decided by way of summary judgment, Justice LeBlanc considered whether Audi had established just cause to terminate Mr. Durant's employment. In doing so, Justice LeBlanc considered the nature and extent of the misconduct, the surrounding circumstances and whether dismissal was warranted. Justice LeBlanc found that there was no evidence that the female client was intoxicated or behaving as Mr. Durant alleged; that the video was taken for improper, non-work related purposes; Mr. Durant was a first point of contact for clients; and he did not accept any responsibility for this behaviour. Justice LeBlanc also found that Audi had placed a high level of trust in Mr. Durant in this role as a "customer touchpoint"; his behaviour would have harmed Audi; and the misconduct in question was very serious, striking at the

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Reference Checks: A Smarter Approach

Practical tips for employers

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The "reference check" can be a tricky task for HR professionals across all industries. The specific position you are trying to fill can also increase the importance of conducting a check depending on the seniority, skills and experience required, as well as the responsibilities of the role.

So, what exactly can you legally ask when conducting a reference check? There are definitely some prohibited topics. The *Canadian Human Rights Act* defines prohibited grounds of discrimination. These grounds are: race, national or ethnic origin, colour, religion, age, sex (which includes pregnancy or childbirth), sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted. Accordingly, reference check questions should avoid these areas directly and indirectly.

Inquiries should be limited to job-related information and should not stray from the business focus. Unrelated topics would include "hobbies, social activities, political beliefs, residence, medical status and any past legal actions including workers' compensation claims and safety complaints.

Can a reference refuse to answer? Yes. The interviewer may encourage their participation and add explanation on what types of questions would be asked. Inform them that the applicant authorized the hiring company to contact them and provided their contact information.

Once you have expressed the importance of the reference check and there is still refusal to continue, thank them for their time. Make note of this in the applicant's file. Inform the person who provided the reference of the situation and perhaps they will provide another contact.

What should an employer do if they receive a negative review on a potential candidate? References talk to you in confidence. Therefore, you probably shouldn't immediately tell the candidate who provided the bad review. The employer should consider who gave the bad reference. Perhaps there could have been some underlying circumstances causing ill-will. Compare the bad review to the other references' reviews. Perhaps it was a one-time incident or was it a consistent bad trait? If you received multiple bad references, you may want to pass on this applicant. In the end, an employer needs to assess all the reviews and evaluate them weighing the pros and cons.

On the other side of the fence, there are some factors to consider if you find yourself in the former employer's position and have been called upon for a reference of a previous employee. Recent case law indicates that you are in fact able to give a negative review. However, the points communicated must be factual and verified prior to sharing. It simply should not just be an opinion that is communicated to a potential employer. We will explain more in the second part of this series coming soon.

What if an employer needs to dig deeper? Some employers need to fill positions that will have access to large sums of money and will require the employer to put trust in the employee in that position. They have to be sure that the person does not have a criminal record and/or any skeletons in their closet that may cause concern. What is frequently discussed among HR teams is the **Consumer Reporting Act** and how it governs what an employer can access. This act outlines what is accessible to potential employers through a consumer report. Items such as credit reports, criminal records and bankruptcy records are included in this act and although they are available, there are guidelines by which who can access and for what purpose. This too will be discussed further in the second part of this series.

You might consider hiring a professional organization to assist you with your background and reference checks. Not only will this improve the quality of the results, it also allows you the employer to ensure the search is non-bias. The specialists can help track information such as bankruptcy records (if they exist), criminal records, social media posts, asset profiles, education verification, existing lawsuits, etc. Conducting this type of search however needs to be done only when it can be justified and is relevant to the position for which the employee is being considered. It should also be done only when the employee has been provided with a job offer that states the offer is conditional on a successful background check.

Is permission required for these types of searches? Yes. The candidate must agree in writing to such a search and be informed as to what records you are going to be looking at. It is also important to note that your background search policies should be consistent, meaning you should not simply choose randomly which candidate requires the background check.

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The Employer's Obligation to Retain Records

Failure to keep proper records will land you in court

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Feature

Too many music aficionados, collecting records may be a hobby, but for employers, maintaining employee records is a statutory requirement that may be easy to overlook.

Under section 14(1) of the Alberta *Employment Standards Code* (the "*Code*"), an employer is required to keep up-to-date records of the following information for each employee:

- regular and overtime hours of work, recorded on a daily basis;
- wage rate and overtime rate;
- earnings paid showing separately each component of the earnings for each pay period;
- deductions from earnings and the reason for each deduction;
- time off instead of overtime pay provided and taken; and
- any other information required by the regulations.

Section 14(4) of the *Code* sets out further categories of employee information that must be kept by the employer.

There are exemptions to some of the recordkeeping requirements but even if an employer is not required to keep them, it may be wise to do so.

The Risk of Deficient Records

Not keeping the statutorily required records can lead to penalties and fines.

Another consideration is that, without proper records, employers may face an evidentiary obstacle if employees allege that they were not paid their proper entitlements. Under section 87(2) of the *Code*, if an officer is unable to determine the amount of earnings to which an employee is entitled for the purpose of making an order because the employer has not made or kept complete and accurate employment records, the officer may determine the amount in any manner that the officer considers appropriate. Even worse, if the employee has a journal showing, for example, that they worked 12 hours per day for 7 days per week, the employer then has no documentary means of disputing such evidence.

In *Condominium Corporation No 8722942 v. Buck*, 2019 ABPC 305, the employer sued two former employees for fraudulently paying themselves vacation pay on termination. The employer alleged that the employees had in fact used in excess of their allotted vacation days.

However, the court found that the employer was statutorily obliged to keep records of the vacations showing start and finish dates and the period of employment in which the annual vacation was earned. Since the employer failed to produce any records of the vacation time as required by the *Code*, the court accepted the employee's evidence instead.

In *Workeneh v. 992591 Alberta Ltd.*, 2006 ABPC 244, the employee was a caregiver claiming constructive dismissal and entitlement to overtime and holiday pay. The employer and employee disputed whether the employee worked between 10:00 p.m. and 7:00 a.m. The court found that the employee did, from time to time, provide home care during that period of time. However, the court mentioned that the employer did not provide a log or journal to the employee for the recording of such overtime hours, which was provided to other employees who were paid on an hourly basis. As such, the court ultimately determined overtime based on the terms of the contract relating to the employee's shift rather than the employer's arguments.

So, for employees who may work without supervision, it will still be crucial for the employer to require the employee to track their hours.

Pay Statements

In addition to keeping records, under section 14(2) of the *Code*, an employer must also provide a written statement, at the end of each pay period, to each employee setting out, in respect of the employee, the information set out in section 14(1) of the *Code* and the period of employment covered by the statement.

In addition to the administrative penalty, not providing a clear breakdown in a pay statement may lead to an entire employment agreement being void.

In *RG Bissett Professional Corp v Kusick*, 2018 ABQB 406 ("RG Bissett"), the employee filed a complaint with Alberta Employment Standards claiming vacation pay and holiday pay for the two years prior to the termination of his employment. Under the employment agreement, the employer agreed to pay the employee a gross salary of 40% of his

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Feature

The Employer's Obligation to Retain Records

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monthly receipts of fees, inclusive of vacation pay entitlement.

The umpire found that this clause was inconsistent with the employer's obligation to provide the employee with a written statement separating out his vacation and holiday pay. As such, the clause amounted to an agreement where a provision of the *Code* did not apply, and was therefore against public policy and void.

For employers, stating that the salary includes vacation pay and/or holiday pay can be risky and should be avoided. The different entitlements must, at a minimum, be listed as separate items in the pay statement.

Other Records to Keep

Note that this article describes the minimum standards for recordkeeping required under the *Code*, and there are requirements under other legislation for employers to keep records, including but not limited to, labour standards, occupational health and safety, and tax legislation. It is crucial that employers stay up to date regarding their recordkeeping obligations.

Employer Takeaway

Not only is an employer statutorily required to keep certain employee records, employers should keep additional records, such as correspondence, acknowledgements or other agreements, in the event of any future disputes with employees. Based on past decisions, the courts and umpires will generally expect the employer to provide the proper records, and failing to do so can lead to the court or umpire calculating entitlements that may be more than the employer expects. Accurate records of the employee's entitlements are essential.

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"This was in the suggestion box. What do you think it means?"

Michelle Lane

Leadership Effectiveness Coach and Facilitator, Vibrant Leaders

Curiosity: A Vital Component in Your Leadership Toolkit

Mastering the skill

Samuel Johnson said "Curiosity is one of the most permanent and certain characteristics of a vigorous intellect."

Being curious makes you a better leader. Why? Curiosity goes hand in hand with openness, one of the essential qualities of an effective leader. Leaders with an open mind know they don't have all the answers. And, they're willing to appreciate that their answers may not be the best ones. As a result, they are far more likely to foster a culture of openness and dialogue in their teams and organizations. They invite and encourage others to contribute their ideas and perspectives. In the process, they enable better performance and the growth and development of those they lead.

How can you can make curiosity work for you? Here are five concrete ways.

Be intentional: Set a daily intention to be curious and choose one or more ways of being curious today. For example, one leader I coach has built his curiosity by challenging himself to listen deeply to everyone else in a meeting before he speaks. Realizing that he was not hearing from his team because he was often dominating conversations, he wanted to build the team's confidence in speaking up and contributing their ideas.

Choosing to enter each meeting with curiosity strengthened his leadership. Now, team members are increasingly stepping up and contributing. Teamwork is stronger and so are the leader's relationships with team members. This is a result of being intentional about being curious.

Separate what you know from what you think you know: Have you ever found yourself thinking something is true, only to find out later that you were completely wrong? Being a more curious leader helps you get better at noticing when you might be making assumptions or jumping to conclusions without considering all the facts. If that's one of your leadership defaults, get into the habit of being curious about yourself and asking a few questions:

- What do you know to be true about a situation; what makes you so sure?
- What might you be missing, overlooking or assuming?
- How might you be wrong?

When you develop a practice like this, you'll be giving your curiosity muscles a good workout. Even better, you'll learn to appreciate when you may be falling into the very human habit of assuming things, rather than focussing on what is true.

> Curiosity goes hand in hand with openness, one of the essential qualities of an effective leader.

Ask more questions: One of the best ways to be more curious is to ask a question and listen fully to the answer. If your question is a good one (think open-ended at a minimum), you'll naturally be conveying a desire to learn more. Many leaders who practice this skill have found that the right question can be a powerful way of opening and deepening conversations and learning.

Be curious about your own perspective: Are you more likely to be open or closed in your thinking or your approach to a conversation, a relationship or a situation? How might your perspective be serving you or getting in the way? The more you know about your own perspective, the better. You can begin by noticing your innate style and approach. For example, are you actively inviting others to contribute or signalling in some way that you're not interested in what they may have to say? How might being curious about your perspective in the moment enable you to shift your stance?

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Feature

Feature

Curiosity: A Vital Component in Your Leadership Toolkit

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Ask for feedback: Not sure if you're being curious enough? Perhaps you're wondering how you can use curiosity to strengthen your openness. One of the best ways to learn more is to ask those around you for feedback. You can ask a close, trusted colleague for informal feedback or dive into a formal 360 leadership assessment that gathers input from your direct reports, your peers, your boss and yourself. There are lots of ways to get a read. Be curious about what you learn, especially about what's working and what still needs work. Then use your curiosity to refine your approach.

Is your curiosity piqued? I hope so. Curiosity is a powerful skill to add to your leadership toolkit. You can do it in five concrete ways:

- be intentional about being curious;
- focus on what you know to be true;
- ask more questions;
- pay attention to your own perspective;
- invite feedback from others.

As you become more aware and in tune with yourself and the ways in which you are being curious or closed, you can begin to reflect on what might be leading you in each direction. The more you know about this quality in yourself, the more you can do to use curiosity in deepening your leadership effectiveness.

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Winning and Losing with Restrictive Covenants

Don't overload the restrictions to avoid clauses being unenforceable

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Feature

When Restrictive Covenants, such as Non-Compete and Non-Solicitation clauses, are built into employment contracts, they can be a useful tool in protecting an employer's business interests. However, the enforceability of such provisions is a complex and often daunting area of Canadian law. Numerous factors are taken into consideration during a Court's analysis in deciding whether or not a Restrictive Covenant should be upheld and enforced. Even at the best of times, whether or not a Court will uphold the enforceability of such clauses can appear unpredictable. To illustrate the foregoing, here is a simplified case comparison of two relatively similar Ontario Court of Appeal cases.

Winning – *Smilecorp Inc v Pesin*

A Non-Solicitation Clause was agreed to in a dentist's employment contract. The clause prohibited the dentist from soliciting any patients of his employer's dental practice, as well as sending any communications or notice of his resignation to any patients of the practice. The dentist was prohibited from doing so for a period of 2 years.

Before receiving his notice of termination, the dentist made copies of the practice's patient list without the consent of the practice, his intent being to use the information to inform patients of his new practice location. In response, the practice commenced legal action against the dentist for breach of the clause contained within the employment contract.

The Court determined that the clause was enforceable and that the dentist was in breach of the employment contract. The dentist was ordered to pay damages for the business losses the practice suffered.

> Overall, the more "restrictive" that a Restrictive Covenant is, the more difficult it will be to legally enforce.

Losing – *Lyons v Multari*

A Non-Compete Clause was agreed to in a dental surgeon's employment contract. The clause prohibited the dental surgeon from competing within a 5-mile radius of his employer's dental practice. The dental surgeon was prohibited from doing so for a period of 3 years.

After delivering his notice of resignation, the dental surgeon opened a new oral surgery practice approximately 3.7 miles away from the practice. In response, the practice commenced legal action against the dental surgeon for breach of the clause contained within the employment contract.

Despite a seemingly clear breach of the clause, the Court determined that the clause was not enforceable because it was unreasonable in the circumstances; the dental surgeon was not in breach of the employment contract. The practice was not entitled to damages for any business losses suffered.

These cases had similar facts yet arrive at opposite conclusions regarding enforceability of their respective Restrictive Covenants. **The key lesson: enforceability of Restrictive Covenants is extremely fact-dependant.** Generally speaking, enforceability will hinge on the following:

- Legitimate business interests — Does the employer have a proprietary interest in need of protection via Restrictive Covenant?
- Type of Restrictive Covenant used — Was the use of a Non-Compete clause reasonably warranted or would have the use of a Non-Solicitation clause sufficed to adequately protect business interests?
- Employee's position with the employer — Was the employee considered a "key employee", the "face of the employer" etc., or did the employee have limited interaction with clients and customers?
- Geographic scope of the Restrictive Covenant — Was the geographic scope overbroad or was it appropriate to protect business interests?
- Duration of the Restrictive Covenant — Was the duration unnecessarily long or was it appropriate to protect business interests?
- Clients and customers that the Restrictive Covenant applies to — Does it only apply to existing clients and customers or future clients and customers as well?

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Termination Clauses

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It is very difficult to generalize as to what the amount should be as it is always specific to the circumstances (and the terms of the particular agreement being replaced).

Overall, employers must accept the reality that their employment contracts may be in jeopardy and should be developing strategies to accept that reality. The challenge is manageable but certainly requires proper planning.

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I Spy

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heart of the employment relationship. Justice LeBlanc also rejected Mr. Durant's argument that his taking of the video was no different than security cameras in the workplace, noting that Audi's clients don't expect to be surreptitiously filmed. As a result, Justice LeBlanc found that Audi had just cause to terminate Mr. Durant's employment and dismissed his claim.

This case demonstrates the kind of conduct that may establish just cause in relation to privacy issues and showcases the importance of progressive discipline in establishing just cause.

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Reference Checks

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A policy should outline the types of searches that will be conducted according to the role or position. This prevents any type of backlash that may occur and speculation of the possibility of discrimination occurring in the hiring process.

Keep in mind that professional organizations with extensive experience in background checks have the abilities and experience of knowing where, how and when to conduct searches and can assist your HR team in all matters relating to the hiring process.

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Restrictive Covenants

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- Industry standards; and
- Public interest in preventing Restrictive Covenants from creating monopolies.

Overall, the more "restrictive" that a Restrictive Covenant is, the more difficult it will be to legally enforce. Ironically, an employer's interests are best served by drafting the restrictions as narrowly as possible to protect the employer but not step further than absolutely needed, to avoid the entire restriction clause being unenforceable. Given this delicate balance, employers should seek legal advice if they wish to include such clauses in employment contracts.

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