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SUMMER 2022 VOLUME 20, NO. 3

Nathaly Pinchuk
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Executive Director

Perspective

Looking Out for Number One Boosts Productivity and Performance

The importance of mental health self-care

Sometimes it feels like things have never been more stressful in all aspects of our lives. We feel mentally drained and exhausted. Often enough before we even know it, we find ourselves struggling and overwhelmed. First of all, it's okay to not be okay. Give yourself that permission. Secondly, don't be afraid to ask for help when you need it. At certain times in our lives, we ALL need it.

Managing your own mental health is an element of self-care that you should not avoid. Here are some suggestions from the experts to help you get there.

Stay active and exercise

Participating in activities that you enjoy outside of working hours can greatly benefit your mental health. This is especially true of things that involve other people like playing golf, going to a yoga class or going to the gym. Our mood is directly affected by chemicals in the body and even mild forms of exercise can release dopamines that help us look and feel better. Walking is a great exercise that is most beneficial for both mind and body. Exercise reduces stress and helps us sleep better, both vital elements of maintaining good mental health.

Sleep

Having a good and restful sleep pattern helps us stay sane and healthy. So does having good sleep etiquette. This involves maintaining regular sleep hours that work for you and your body as well as being careful about what you eat, drink and watch before you go to bed. Use the time before you go to bed to relax and unwind. You could read or have a long, soothing bath. Try not to take TV or your electronics to bed with you. They may entertain you, but they will also stimulate your brain when you are trying to get it to slow down. Our bodies heal and recover when we sleep and so do our minds.

Eat and drink in moderation

Nutrition and mental health experts alike agree that eating plenty of fruits and vegetables is good for your overall mental health. Foods rich in fatty acids like salmon, nuts, seeds, beans and lentils are considered great brain foods. Refined sugar products (like those we crave when we are feeling low) will not cure depression. These refined sugar products will increase stress levels. Focus on eating good foods in moderation to maintain your body's natural balance. Do the same with alcohol. One drink to unwind or a glass of wine with dinner may be acceptable, but be careful not to use alcohol or marijuana as coping mechanisms. It's a short-term fix that may cause longer term problems.

Don't isolate

The pandemic certainly taught us that while we needed to physically isolate to prevent disease transmission, it was more important than ever to not socially isolate. We found inventive ways to participate with other people through online book clubs and exercise classes, even group Zoom games and just old-fashioned chats on the telephone with family and friends. Now that we can do more in person, we should reap the benefits of social interaction for our mental health and well-being. We can finally do more outdoors in warmer weather with less fear of disease transmission, so get out, be active and have fun while you can.

Ask for help and accept it

If you feel you need more support, ask for it. All of us have times where we've experienced loss, grief or just troubling times in life where we have to talk to someone who will just listen. If your close friends offer to help by taking you to dinner or a movie, accept the offer and go. It may just get you out of your funk. So many of us have sought professional advice as well. Psychologists, psychiatrists and counsellors have a lot to offer and may be able to guide you back to a better place. Sometimes a doctor may even prescribe medication. If you are struggling, you should consider this option instead of sinking deeper.

Take a Mental Health Day

Give yourself permission to take a mental health day when you need it. Yes, you can be assured that we all need one from time to time. Don't plan to do anything other than resting and recuperating. Give your mind a rest that day. Watch corny comedies or action flicks. Book yourself a massage or a reiki session- whatever helps you ease the stress and strain you are feeling. Often enough, one day off can make all the difference and may actually prevent you from taking off more time in the future.

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Remote Work: How's It Working for You?

Getting results in this new environment

Brian W. Pascal
RPR, CMP, RPT
President

President's Message

There are numerous advantages for both employees and the employer when it comes to remote work. Do you really know if your employees are actually working? Are they all working to their full potential? I am not saying they're not. I am merely asking the question.

One quick check is output. Are they completing their assigned work correctly and on time? That's a pretty good gauge. Are they really working all of the hours that you are paying them to be on duty for you? If they were in the office and completed their regular work, wouldn't you assign them more? Again, just asking.

I'm not the only one asking these questions. Some studies suggest that employees are generally more productive working remotely. Mostly, this is because they control their environment. However, this is only true if they have a dedicated workspace and minimal outside distractions. What happens if they have two young children and a dog running around them? In that scenario, they are likely not as productive as being in the office.

How can you determine how productive your employees are while they work remotely? Forbes magazine did an article on this issue. Joseph Folman and Jack Zenger examined a dataset of 9,755 individual contributors to look at identifying behaviours that indicate employees are being productive. The behaviours include: takes initiative, delivers consistent results, displays good judgement, walks the talk and willing to take on more.

That is not a bad set of indicators. But unless you monitor and follow up, they are only signals and not results. It looks like remote and hybrid working arrangements are here to stay for many traditional office workers. Our challenge as managers is to make sure they are happy and supported to do that. We also must make sure that the organization gets its money's worth.

To accomplish this, you need a plan. This may include sharing your expectations as candidly as possible, offering regular opportunities for two-way feedback and monitoring your employees' work the same as if they were sitting down the hall from you. You can build in some reporting pieces like end of day or weekly reports on their activities and some spot checks if you feel it might be necessary for some employees.

It's a new world out there in the virtual workplace of the future. In any case, you still have to work if you want to get paid. There's an old proverb that comes to mind. "No bees, no honey. No work, no money." True in whatever space you work in.

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

INSIDE THIS ISSUE

Perspective
Nathaly Pinchuk 2

President's Message
Brian Pascal 3

Features

Are You Remotely Qualified?
Colin Fetter
Megan Van Huizen 4

Working For Workers Act
Dan Palayew
Odessa O'Dell 6

Ready, Set, Release
Kyle MacIsaac
Caroline Spindler 8

Navigating Social Media
Brian Sartorelli
Sarah Bunder 10

Test For Discrimination
Tom Ross
Jessica Kruhlak 11

Lead With Heart
Michelle Lane...................... 13

Beware Of Allegations
Howard Levitt 14

Employees With History
Tommy Leung
Patricia McGauley................ 15

Ask The Expert

Overcoming Resistance
Janneke Ritchie 5

"You were three minutes late for work today, Peterson. Big Tony here, my new office manager, doesn't like it when employees are 3 minutes late."

Are You Remotely Qualified?

How to mitigate the risks and pitfalls of remote hiring

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Feature

The pandemic has changed much about the traditional employment relationship. One change that may be here to stay is the reality of remote work and as a result, remote hiring. While this 'new normal' may impact employers' ability to properly assess a candidate and their qualifications from a distance, the legal principals remain the same. Given the increased uncertainty with remote hires, it is now more important than ever to ensure that employment contracts and expectations are clearly set out at the beginning of the relationship.

Employers can protect themselves from the pitfalls of remote hiring by taking the following steps:

1. **Implement a Probationary Period:** This allows for a trial period to assess the candidate's suitability. Should the candidate not meet expectations, the employer can take steps to terminate without notice. It is important that probation and the associated termination rights are set out clearly in an employment agreement and comply with applicable employment standards legislation in order to be enforceable (i.e., 90 days or less in Alberta).
2. **Early Evaluation:** Schedule a performance review and assessment in advance of the end of the probation period to ensure the opportunity to evaluate the employee's suitability within the probationary timeframe.
3. **Termination Clause:** Setting out severance provisions from the beginning functions to protect employers in the event the candidate is not what they first seem. Particularly when the candidate is working remotely, it may take additional time (beyond probation) to determine whether they are a good fit. In order to be enforceable, termination clauses must be clear, unambiguous and compliant with applicable employment standards legislation. In the absence of a clear, valid termination clause, an employee will be entitled to "common law" notice or severance which far exceeds what most employers are satisfied and comfortable with.
4. **Temporary Layoff Provision:** We know that temporary layoffs may prove urgent, necessary and unexpected. Given this knowledge, it is important to include such provisions in the employment agreement in order to lessen the risk of constructive dismissal claims should temporary layoffs be required again in the future.
5. **Prioritize the Paperwork:** Make sure that employment contracts are provided to the candidate for their acceptance and accepted and signed in advance of their start date. It should be clear that any offer is contingent on the employee signing the contract. Remote hiring may result in essential paperwork falling through the cracks and it is important to remember that contracts signed after the candidate has started will face enforceability challenges. Your employment contract can be as simple as a letter of hire on terms and conditions, with the employee signing at the bottom. However, the key is that it must be clear, offered, accepted and signed prior to confirming the hire and letting the employee commence work.

To ensure enforceability, we recommend seeking legal review and advice for all employment agreements in advance of hiring new candidates.

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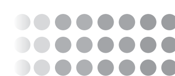

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Ask the Expert

Overcoming resistance and thriving in a workplace with AI — *The future is here- don't miss the train!*

Q | ***Your leadership team just announced an AI initiative. What do you do next?*** Your VP just gave you a heads-up that next week, the CEO will be announcing a new initiative to implement an AI-enabled HR solution across the enterprise.

You're not completely taken off guard. You know the company is under pressure to stay competitive and you've heard for the last few years about how artificial intelligence (AI) is poised to transform the workplace. You already know this is going to unsettle your team. They're expecting to see pink slips the minute they hear "AI". To be honest, you're not too sure what this means for you either. What do you do next?

A | ***First, take a deep breath.***

This will be a big change and as a leader, you are going to need your best thinking to make the most of it and to guide your team. Know that while there is uncertainty, there is tremendous opportunity as well – not just opportunity for your organization, but opportunity for you and for your team. This will definitely take some work.

Decide to lean in.

AI will change our world, not just how we work, but also how we live, play and age. So, with best thinking engaged, decide to be a part of this AI-enhanced future.

Haven't heard about an AI initiative impacting your team yet? You're not off the hook. For sure your leadership team is talking about it, probably talking to vendors as you read this. Let's hope they are. It's a competitive world out there and no one wants to be left behind-including you.

Get curious.

AI is technology worth learning. While it is super complex technologically, you can understand its implications without understanding exactly how it works. Prediction Machines: The Simple Economics of Artificial Intelligence is a great place to start. Written for a business audience, authors Ajay Agrawal, Joshua Gans and Avi Goldfarb from the Rotman School of Management, University of Toronto, offer an accessible introduction and overview of the implications of AI for business.

It's such a loaded term. So much has been said about the potential, the risks and the promise of AI. For a general take on some of those, take a look at Martin Ford's The Rule of the Robots: How Artificial Intelligence Will Transform Everything. If YouTube is your thing, watch Ford discussing the book.

With these starting points as grounding, connect with the team leading the initiative in your organization. You'll probably find that it's a targeted solution intended to improve the efficiency of a specific data-intense process or set of processes, because that is what AI does well.

Go myth-busting.

Armed with your emerging understanding of what's real and what's not, it's time to get your team involved.

Host a session to identify 3-5 myths, rumours or misinformation about AI and the proposed implementation. Try to base this list on what people actually say, what you have heard or seen in your department, not just what you think they are saying.

Take those one at a time and debunk or confirm them. Pro-tip: Don't debunk all of them. Confirm some to keep your audience guessing and engaged. Create a campaign. Make it playful and informative. Have fun with it.

Workshop the opportunities.

Now that your team is a little better versed in what is real about both AI in general and your company's AI initiative in particular, it's time to get in the game of figuring out how to make the tech work for you and by extension, for the organization.

Host a session with your team to brainstorm how this initiative can make your team better. What processes are likely to be impacted and what would make them work better? It's very likely that data will play a big part, so ask about what data you collect or wish that you could that would help your team deliver more efficiently. Envision how this new technology, assuming it works as planned, can transform your work and what that could mean for your team and your department. Technology is an enabler, so it's essential to understand what exactly you're looking to enable. Add your voice to the discussion of what's possible.

Be patient.

We're still at the beginning of integrating AI-enabled technologies into the workplace. This will not be the last AI initiative in your organization or your career. Understand that it will be messy and there will likely be starts and stops. Commit to the journey. AI is definitely in your future.

Good luck and please feel free to reach out with any questions or comments.

Janneke Ritchie is Founder of Orange Gate Labs, where curious, driven people build confidence and ability with digital technologies. She can be reached at janneke@orangegatelabs.com.

The Working For Workers Act, 2021

Ontario passes employee-friendly legislation

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Feature

On December 2, 2021, a suite of employment-related changes that will affect employer policies, agreements and recruitment partnerships took effect. Notably, amendments to the Ontario *Employment Standards Act, 2000* (the "ESA") made Ontario the first Canadian province to legislate the "Right to Disconnect" and to generally prohibit non-compete agreements. The province also restricted the use of recruiting services that charge foreign nationals a recruitment fee. Pending amendments will impose licencing requirements on recruiting agencies.

The Right To Disconnect

The ESA now includes the "Right to Disconnect" which is defined to mean "not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages." The amendments to the ESA will require that employers with more than 25 employees by January 1st of each calendar year implement a written policy on disconnecting from work for "all employees" by March 1st. For the purposes of determining whether an employer meets the 25-employee threshold, officers and full time, part-time and casual employees are to be included. Note that in 2022, employers with 25 or more employees on January 1st must implement a written policy by June 2nd and must provide each of their employees with a copy of the written policy within 30 days of preparing the policy.

Currently, the ESA requires that disconnecting from work policies contain "such information as may be prescribed." As of January 2022, the province has not yet released any directives or regulations that specify the information that employers must include in their written policies. However, the language that defines the Right to Disconnect suggests that policies will apply to a limited range of communication-based tasks, and the Ministry of Labour has commented that such policies could include "expectations about response time for emails and encouraging employees to turn on out-of-office notifications when they aren't working."

Takeaways for Employers

All employers who meet the 25-employee threshold should begin creating their new policies. This might include consideration of reviewing and revising existing "work from home" and "work time" policies, assessing critical industry and business specific needs that require communications outside regular work hours and consulting with legal counsel to draft a disconnecting from work policy. We also encourage monitoring for additional government directives and regulations specifying the information that must be included in written policies.

A Prohibition of Non-Competition Agreements

Retroactive to October 25, 2021, the *ESA* now generally prohibits employers and prospective employers from entering into non-compete clauses and agreements. In short, any non-competes that violate the *ESA* will be considered void.

As defined, a non-compete agreement includes any agreement that "prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer's business" after the employment relationship ends.

However, two key exceptions have been contemplated. First, the ban on non-competes does not apply to an "executive," defined to include any person who holds the office of CEO, President, CAO, COO, CFO, CIO, CLO, CHRO, CCDO, or "any other chief executive position." Second, when a business or part of a business is sold or leased, the ban does not apply to agreements that prohibit a "seller" from competing with a purchaser if, "immediately following the sale, the seller becomes an employee of the purchaser."

It is important to note that the prohibition applies retroactively to October 25, 2021; however, it would appear that the changes will not automatically void non-competition agreements entered into before October 25, 2021. The Ministry of Labour notes in its "Your guide to the Employment Standards Act" (Updated January 27, 2022)" that the "prohibition does not apply to non-compete agreements entered into before October 25, 2021;" however, it is possible that future case law and regulations may modify this policy position. We also note that

continued next page...

THE WORKING FOR WORKERS ACT, 2021

... concluded from page 6

while non-competition agreements entered into prior to October 25, 2021 may not automatically be void due to the amendments to the ESA, they will remain subject to the stringent tests applied by the Court.

Takeaways for Employers

In light of these amendments, employers should review their employment-related agreements to identify and remove any non-competition clauses except where one of the exceptions apply. Notably, non-competes that pre-date October 25, 2021 will likely be void if the material terms of the employment agreement subsequently change. In other words, if an employee is asked to sign a new employment agreement after October 25, 2021, any non-competition clause that may have existed in a prior agreement will be void.

To protect their business interests, employers should also collaborate with legal counsel to consider incorporating other types of contractual provisions. This might include confidentiality agreements, non-solicitation agreements, intellectual property and garden leave clauses.

Recruiting Agency Licencing & Restrictions

Although it did not come into force with the passing of Bill 27, amendments to the ESA will require temporary help agencies and recruiters to apply for and obtain a licence to operate, and prohibit clients from "knowingly" engaging the services of an unlicensed agency or recruiter. To obtain a licence, among other requirements, recruiters will have to state that they have not breached the *Employment Protection for Foreign Nationals Act, 2009 (the "EPFNA")* by charging foreign nationals a fee for services, goods and benefits, and applicants who retain recruiters will be required to make statements to similar effect. A breach of the *EPFNA* in this respect will constitute grounds for the Director of Employment Standards to revoke a licence, or refuse to issue or renew a licence. Notably, these amendments, once in force, will also require agency clients and recruiters to maintain specified records.

Additionally, amendments to the *EPFNA* which came into force on December 2, 2021 prohibit recruiters and employers from "knowingly" using recruiting services that have contravened the *EPFNA* by charging foreign nationals a fee. If a recruiter contravenes this prohibition by using the services of other recruiters that have charged foreign nationals a fee, the recruiter and their directors share the responsibility to repay the fee with the other recruiter and can be subject to recovery proceedings.

Takeaways for Employers

For employers that engage temporary help agencies and recruiters, particularly to employ foreign nationals, these amendments carry significant implications that create potential liability. As such, employers should review their recruiting partnerships to ensure that partner agencies are properly licensed so as to ensure compliance with the new requirements.

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Ready, Set, Release: Interpretation of Releases — *How far can you go?*

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Feature

Courtroom dramas often neglect one of the most common outcomes in litigation: settlement. Parties bring disputes before the courts or other adjudicative bodies and somewhere along the line, the parties resolve the dispute before arguments are even made. The key components of a settlement generally include a monetary amount paid or other favourable term provided by one party to the other in exchange for the other party signing a release, relieving the paying party of the current claim or complaint and barring the receiving party from bringing any further related claims. In employment law, releases are common practice. But how far can the scope of a release go? The interpretation of a release and its scope was at issue in *Corner Brook (City) v Bailey,* 2021 SCC 29 (CanLII) *("Corner Brook").*

In Corner Brook, the respondent Mary Bailey, struck David Temple, an employee of the City of Corner Brook (the "City"), who was working at the time with her husband's car. Mr. Temple sued Mrs. Bailey for compensation for the injuries he suffered in the accident. Mrs. Bailey and her husband (the "Baileys") sued the City in a separate action for damage to the car and personal injuries, which the parties settled. As a result of the settlement, the Baileys signed a release discontinuing the claim against the City and releasing the City from liability relating to the accident.

Years later, the Baileys brought a third party claim against the City for contribution or indemnity from the City in the action brought against Mrs. Bailey by Mr. Temple. The City brought a summary trial application to have the claim dismissed on the basis that the claim was barred by the release. The Baileys took the position that the claim was not barred by the release because the claim in question was not specifically contemplated by the parties when the release was executed.

The application judge considered the words of the release, as well as what was contemplated by the parties when the release was signed and found that not only did the words of the release bar the claim, but that at the time the release was signed, the Baileys were aware of the action brought against Mrs. Bailey by Mr. Temple and all of the facts underlying the third-party claim. Furthermore, correspondence between counsel for the city and the Baileys regarding the release indicated that the release applied to any and all claims relating to the accident. The application judge found that the release barred the third-party claim and the claim was stayed.

The Baileys appealed to the Court of Appeal of Newfoundland and Labrador. The Court of Appeal determined that the application judge made errors in law. In reviewing the decision of the application judge on a correctness standard, the Court of Appeal found that the broad phrases in the release should be considered against the more specific references to the claim brought by the Baileys against the City for property damage and personal injury. The Court of Appeal further noted that the exchange of correspondence prior to the execution of the release made no reference to the claim brought by Mr. Temple against Mrs. Bailey or any future third party action arising therefrom.

Ultimately, the Court of Appeal concluded that the words, the context and the exchange of correspondence were all consistent with the release being interpreted as a release of the Baileys' claims in the action brought against the City for property damage and personal injury only and reinstated the third-party notice.

The City appealed to the Supreme Court of Canada where it argued that the release should be interpreted using the normal rules of contractual interpretation. The City argued that the words of the agreement plainly described its subject matter as all claims arising from the accident, and that there is nothing in the factual matrix that could narrow this subject matter without departing from the words of the agreement.

The Baileys argued that regardless of which rule of interpretation applied, the result was the same, that the release foreclosed her right right to make any claim for injuries arising from the accident, but was not intended to prohibit the Baileys from seeking contribution or indemnity from the City for potential responsibility it had for Mr. Temple's injuries.

In coming to its conclusion, the Supreme Court of Canada examined the law governing the interpretation of releases, the standard of review and whether the application judge made a reviewable error in his interpretation of the release.

continued next page...

Ready, Set, Release: Interpretation of Releases

The Court considered the current approach to contractual interpretation set out in *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 (CanLII) ("Sattva"), which states that contracts should be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. *Sattva* also directed adjudicators to look to the surrounding circumstances known to the parties at the time of contract in interpreting the meaning of the words of a contract, confirming the general rule that factual context is considered in interpreting contracts.

The Court determined that the principles of contractual interpretation as set out in *Sattva* are to be applied to releases and there are no special rules of interpretation that apply to releases.

The Court went on to conclude that the Court of Appeal applied the wrong standard of review and rejected the Court of Appeal's findings that the application judge erred such that appellate intervention was warranted. Specifically, the Court found that the application judge considered the surrounding circumstances, and made a finding about what was in the contemplation or mutual intention of both parties, noting that the application judge determined that the parties were specifically contemplating any and all claims relating to the accident, including the Baileys' third-party claim, even if it wasn't specifically contemplated by the parties. Ultimately, the Court determined that the findings of the application judge were owed deference, allowed the appeal, and reinstated the order of applications judge, staying the claim.

While the principles of contractual interpretation apply equally to releases as they do to other types of contracts, careful drafting can ensure that releases cover the desired scope.

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IPM ACCREDITATION PROGRAMS

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Navigating Social Media Platforms

Mining the information more effectively

Brian Sartorelli
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Investigative Risk Management (IRM)

Sarah Bunder
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Investigative Risk Management (IRM)

Feature

For years, employers have known that social media may hold key information relating to ongoing investigations, claims and incidents around their workplace. The challenge has always been how to navigate the massive amounts of posts and content out there to discover what is relevant to you.

In years past, employers would often depend on the IT or "computer savvy" person within their office to take a look at the content that may be out there; however, in doing so, they often opened themselves up to leaving behind digital footprints which could negatively impact the future of their investigations.

Private investigation companies have also been utilized. When employers turn to social media or open-source investigators to locate, mine and archive key information for them, employers lowered their risk of leaving behind digital footprints. This allows them to move forward with surveillance or statements as required, without the investigation already being known to the person(s) of interest.

With the ever-changing platforms, including Facebook removing the key search capabilities with no notice to investigators or government bodies, we must turn to the technology of the future to continue mining this information effectively.

Social media listening platforms, also known as data recovery platforms, are a prime example of the emerging technologies that are being advanced. These platforms are the next level in open source or social media investigations.

Where these programs excel is in communication with the providers, meaning that they have negotiated contracts with the major social media platforms which allows for the exchange of information. In some cases, this may mean obtaining more information than what is available to the average user, all while abiding by their terms of service. For example, Twitter drastically reduces the information the average user can see to approximately 10 percent of the information available on the platform. Many data recovery platforms have access to all the content posted to Twitter with no restrictions.

Uses for platforms such as these may include the following:

Geo-fencing - Imagine a digital net which is deployed over a specified location and captures all public social media posts from within the area. This tool is especially useful for things such as strike mitigation, allowing you to review the content of the posts within a workplace and determine what complaints, if any, are being shared by the staff therein. This tool may also reveal which employees are instigating job actions and which employees are revealing confidential information related to negotiations in the event of a strike.

Witness locates –This is useful for issues such as slip and fall, workplace injury, theft or vandalism. Social media is the first stop for people sharing content relating to these events. When a post is shared about a situation such as these, data recovery programs may give you a direct link, including username, to those who saw the event in real-time. More beneficial, if these posts are captured within these tools, they are archived, even if the original poster tries to take the content down. In conjunction with a skilled investigator, you can locate the witness and obtain statements within days, rather than months.

Brand protection – Searching by company name, brand name or product name, these platforms will obtain all public conversation relating to a product or company. In addition, most platforms go further than the average surface web search, allowing for searches into the deep web such as forums and specified interest groups to determine how people discuss your company, products and reputation.

Sentiment analysis – Now that you've found the posts, these tools will allow you to review the sentiment, positive or negative, around what people are saying. Not only this, it can also identify who is the biggest supporter and the biggest critic of your organization.

These social media monitoring platforms are still in development. However, in our experience as investigators, there is no question that they will be the future in navigating social media and open-source investigations. Even in their infancy, these platforms have become an invaluable tool in the acquisition and retrieval of data.

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Feature

Clarity on the Test for Discrimination in Relation to Family Status

The three-part Moore Test still holds in Alberta

There has been ongoing confusion about the legal test for discrimination relating to family status. A recent decision of the Alberta Court of Appeal appears to have settled this issue.

The *Alberta Human Rights Act* prohibits employers from discriminating on the basis of family status. Discrimination on the basis of family status typically arises in cases where an employer seeks to apply a seemingly neutral employment policy to all employees, but the policy has an unintended negative impact upon employees who possess a characteristic protected by human rights legislation (e.g., imposing a new shift schedule that results in a parent being unable to satisfy his/her child care obligations).

At law, the test for establishing discrimination was settled by the Supreme Court of Canada decision Moore v *British Columbia (Education)* ("Moore"). Moore requires a complainant to demonstrate that: 1) he/she has a characteristic that is protected from discrimination; 2) he/she has experienced an adverse impact; and 3) the protected characteristic was a factor in the adverse impact.

Following the Moore decision, the Federal Court of Appeal in *Canada (Attorney General) v Johnstone ("Johnstone")* imposed a fourth element to the test for establishing discrimination based on family status. Johnstone indicates that in addition to the three requirements set out in Moore, it "is only if the employee has sought out reasonable alternative childcare arrangements unsuccessfully, and remains unable to fulfill his or her parental obligations, that a prima facie case of discrimination will be made out."

As a result of this conflicting jurisprudence, decision makers have grappled with whether or not the test for prima facie discrimination relating to family status includes this fourth element, that the complainant must demonstrate reasonable attempts to self-accommodate, without success.

This confusion is evident in the decisions leading up to the Alberta Court of Appeal's recent decision, *UNA v AHS*, which clarifies the proper test for discrimination based on family status.

In *UNA v AHS*, the Grievor was a registered nurse working full-time with AHS. Originally, the Grievor worked the required shift rotation of four on, four off. The Grievor, the mother of two infant children, was able to coordinate childcare around these shift obligations. However, two years after the Grievor started with AHS, a new shift rotation was announced. The inconsistent nature of this new shift work meant the Grievor and her husband would require 24-hour childcare, a requirement that was financially and logistically infeasible. The Grievor asked to maintain her existing shifts, which AHS refused. Accordingly, her union, UNA, filed a Grievance on her behalf, alleging that AHS failed to accommodate the Grievor.

A grievance arbitration board followed the analysis in the Johnstone decision, concluded the Grievor had not satisfied the element of "self-accommodation," and dismissed the Grievance.

UNA filed a judicial review of the Board's decision with the Alberta Court of Queen's Bench. The Court concluded that the Board had deviated from the Supreme Court of Canada's jurisprudence and indicated that the Moore test leaves no room to add an additional evidentiary requirement on a complainant. "The analysis of self-accommodation is not irrelevant – it just belongs elsewhere."

AHS appealed the Alberta Court of Queen's Bench decision, but was unsuccessful. The Court of Appeal definitively confirmed the proper test for discrimination in the context of family status is the Moore test. The Court confirmed that it is wrong to "import an additional requirement into the test for *prima facie* discrimination in family status cases" and held "family status claimants to a higher standard than other kinds of discrimination."

The Court of Appeal explained that "Johnstone unacceptably conflates prima facie discrimination which is determined at the first stage of the test, with that of duty to accommodate which is determined only at the second justification stage."

What does this mean for employers? It means the test for family status discrimination is the same as any other form of discrimination, the three-part Moore test. Employers are not able to combat an employee's claim for discrimination on the basis of family status where there is insufficient evidence that the employee attempted to remedy the adverse effect. This decision does not mean that employees

continued next page...

Feature

Clarity on the Test for Discrimination in Relation to Family Status

... concluded from page 11

have no obligation to self-accommodate; it just means that failure to self-accommodate does not form part of the test for establishing discrimination.

Once discrimination against an employee has been established, the analysis turns to the bona fide occupational requirement/duty to accommodate justification stage. There, an employer can point to a lack of reasonable participation in the accommodation process to defend an employee's discrimination claim.

This decision serves as a useful reminder that employers may refuse accommodation requests when the employer believes an employee has not taken reasonable steps to reconcile family and work obligations. It is important to approach each case with an open mind and conduct an individualized assessment on how a workplace requirement impacts an employee's family obligations, what solutions might be available and what impact those solutions will have on the workplace.

Most importantly, this decision has definitively confirmed that in Alberta, the test for discrimination in relation to family status is the three-part Moore test.

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To lead others well, do it with heart

Michelle Lane

Leadership Effectiveness Coach and Facilitator, Vibrant Leaders

Feature

When you lead from the heart, you put people and relationships first. Work matters, but the people matter more and the results speak for themselves. Research from organizations such as Gallup, for example, consistently shows that leaders who put people first drive high levels of employee engagement and performance from all.

Effective people leadership begins with heart. Here are three ways to do it well:

1. Connect with your people.

To lead with heart, start with those you lead: build personal connections and cultivate meaningful relationships with them.

Doing it effectively means getting to know your team members and taking the time to listen and to learn. For example: Who are they? What do they care about? What are they especially good at? How and what do they most love to contribute? What causes them to struggle?

To put people and relationships first, you also need to commit the time for more personal, one-to-one connections. Team meetings and regular check-ins with everyone are naturally important, but not enough.

As you take the time and interest to get to know each member of your staff, pay close attention to what matters to them. Then, you can begin to evolve your conversations, relationships and feedback to best support each person's continued growth, development, performance and success.

The process will also enable you to acknowledge the real-world experiences your people may be encountering – whether they are meeting with resounding success you want to celebrate or needing greater clarity and insight about a challenging path ahead.

2. Be fully present, with and for your people.

When it comes to leading with heart, you must be fully present – with body, mind and heart.

Being 'fully present' is about all the ways you give people your complete, undivided attention. It is about committing to 'being there' for them – whether you are together physically or connected through technology.

While this may seem like an easy undertaking, we know from employees how frequently they find themselves struggling because they are not being seen or heard by their leaders in ways that suggest their voice matters. When that happens, there is an adverse effect on employee engagement and performance.

What do you notice about your own habits and the ways in which you are present (or not) to your people?

For example, when you dedicate time to a conversation, do you give it your full attention? Or are you more likely to be distracted by wandering thoughts, incoming messages and alerts, or the next item on your to-do list? Are you a fully present, active listener? As simple as it may sound, being present is harder than you think.

Leading with heart requires your presence and your wholehearted attention. Challenge yourself to do it with your team members and see what happens when you do.

3. Show your people how much you care.

When it comes to leading others, your competence as a leader naturally plays a role; however, it is not enough. Team members also want to know you care about them – personally and professionally.

For example, they want to know you are prepared to invest time in getting to know your people and what they are good at (as well as allowing them to get to know you). They also want to know that you are prepared to be open, honest and real with them – and willing to invite the same in return.

'People do not care how much you know until they know how much you care.' John C. Maxwell

One of the best ways to show you care is by 'encouraging' your team members. Whether your purpose is to encourage even more success or provide words of inspiration and hope when someone may be struggling, your encouragement plays an essential role in enabling everyone to do their best.

When practiced regularly and consistently, encouragement translates to hope and courage when it is needed most. Ultimately, encouragement leads to the kind of team efforts and outcomes that are truly remarkable.

Leading from the heart is one of the most powerful ways you can inspire the best from those you lead. The key to doing it well begins with putting people first. Work still matters, but the people you lead matter more. If you are keen to lead with heart, put your emphasis on these three people-first practices: build personal connections; be fully present; and show how much you care -- for their wellbeing, as well as their work. Do it consistently and you will be sure to bring out the best in everyone you lead.

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Beware of Allegations Made Without Substance

It's not just a quick shakedown of the employer

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Feature

I began practicing law in 1979, when it was genuinely a "profession". The job, as you were trained, was to serve clients. That may not always be the case today. Too many lawyers are creations of advertising and their role, as they see it, is to make extravagant allegations so as to shakedown employers and get as much money as they can paid non-taxably, regardless of whether CRA would permit it, if the truth of the facts was known.

Clients are seen as commodities, a means to personal enrichment for the lawyer in question. They make allegations without considering their accuracy, if that will result in a higher settlement or in structuring that severance to avoid income tax. It is a game.

It is not about taking difficult or tough positions which, if done in good faith, are perfectly permissible, but in dishonest allegations for the purpose of embarrassing the employer. I am confident that most employers have experienced this. Part of this is lack of training of the junior lawyers handling these files but another part is more deliberate.

In a recent mediation case I was involved in, the demand letter, Statement of Claim and Mediation Brief bore scant relationship to the case in question, much of it almost a cut and paste of every other similar document from that firm, regardless of the facts of any particular case. I had an examination for discovery (a deposition under oath of the opposing party) before this mediation. In my Mediation Brief prepared in advance to send to the mediator, I pointed out nine different lies in the letter of demand and Statement of Claim which the employee admitted during discovery were false and advised that he had told his lawyer no such thing. That is the problem with cut and paste letters of demand without regard to the facts. I stated in our Mediation Brief that the firm in question used essentially the same allegations in virtually all of their claims, regardless of their verity and that the mediator, from his own experience with that firm, would know that.

One example was the accusation against my client that this employee was fired because he was too old, i.e., 48. However, this employee admitted in discovery that every other manager was at least as old as he was and, in many cases, much older, and that he never believed that his age resulted in his discharge. How will a Judge react to even that one lie, let alone the employee permitting it to appear in the letter of demand that he acknowledged reviewing before it was sent?

The owner of the company I was representing was himself a victim of racism. He fled the Middle East to Canada years ago to escape anti-Semitism. This employee admitted that the business was "a regular United Nations" consisting of every race under the sun, transgenders, gays, everybody, and that the owner personally was viscerally opposed to any human rights violation. He further admitted that the owner would take these allegations very personally and that they were unfounded. Did it not strike him or his lawyer that this would make the employer LESS likely to settle or agree to any nontaxable damages for mental stress, punitive damages, etc.?

Other misstatements include: that the employee was actively recruited when he had been unemployed for almost a year and accepted a salary 25% less than he last earned; that he had received a $25,000 annual bonus when he received it only once with no bonus in other years; and that he did not receive his ESA entitlements or EI Record of Employment upon termination when he had.

On the main issue in the case itself, the employee had been on lay-off, approached an executive and asked to be terminated rather than remain indefinitely laid off. Since 1,200 employees were on lay-off, there was no apparent hope then of re-opening and the company was uncertain about its future, only a small severance package was offered. The employee accepted it. Four months later, through this law firm, he issued a claim for wrongful dismissal. Although no release had been signed, the employee admitted under oath during discovery that he had agreed to the severance amount offered.

Why would this law firm then issue a claim? Was it because no release was signed and it assumed we could not prove that the parties had agreed and perhaps did not expect that its client would admit to the agreement under oath when I deposed him at examination for discovery? Or did the client leave out that detail to the law firm which did not properly question him on it even though it was the most fundamental aspect of the case?

The Company took a tough position, and with the assistance of an excellent mediator, he dropped his case without payment even of legal fees. How large was his legal bill after the entire process, including mediation and discovery?

This case is but one of many where allegations are made without substance by junior lawyers motivated to take exaggerated positions for what they hope will be a quick shakedown. It also serves as a lesson to employers not to succumb to them.

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Employees with History: Consider Past Service upon Termination

Use caution in negotiations with returning employees

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Feature

When terminating the employment of non-unionized employees in Alberta on a without cause basis, employers are required to give notice or pay in lieu of notice. One of the key factors in determining the applicable termination notice period, both under statute and common law, is the employee's length of service.

However, what happens when there is a break in that service? For example, when an employee leaves for a different employer and later returns to the original employer?

Common Law Reasonable Notice is Complicated

While provincial legislation generally addresses the issue of multiple periods of employment for the purposes of statutory termination notice, the answer is not so clear for common law reasonable notice. This is because courts have the discretion to disregard interruptions in service when determining the notice period, and will examine the break in service in the context of the full period of employment.

In *Hetherington v. Saskatchewan Liquor and Gaming Authority,* 2020 SKQB 110, the employee commenced working for the Government of Saskatchewan in 1987, but in April 2005, the employee voluntarily left her position and assumed the position of manager of organizational development with the City of Lethbridge, Alberta. In October 2007, the employee returned to Saskatchewan public service after a 29-month hiatus. The employee's employment was ultimately terminated in May 2017.

The employer provided severance based on 9.25 years of service (October 2007 to May 2017). However, the employee contended that she should be credited for more than 28 years of service.

The court ultimately recognized the employee's 28 years of service based on several factors. These included that the employer effectively treated her as a long-term employee by providing her with an enhanced salary package to acknowledge her credentials and previous experience, and recalculated her entitlements to vacation leave and long service recognition awards based on her prior employment with the Saskatchewan Workers' Compensation Board and the Saskatchewan Property Management Corporation. As well, the break in service was relatively short when compared to the totality of her employment with the Government of Saskatchewan — 29 months of the approximately 28 years of service or 7.86% of the time. Because of these factors, the court found that it would be unreasonable and illogical to ignore her previous years of service when assessing her severance entitlement.

As can be seen in the above example, whether the courts will exercise their discretion to disregard breaks in service in determining the notice period will be a very fact-specific analysis.

Takeaways

For employers who are planning on rehiring employees who have previous service with the employer, it will be important for the employer to consider the factors set out in *Hetherington* in negotiating the new employment relationship. Consider expressly stating that previous service will not be recognized (unless statutorily required), avoid inducing former employees to return and offer only entitlements that a new employee would receive to the returning employee. Although these steps may help reduce the risk that a court recognizes all previous service with the employer when determining termination notice, the court may still ultimately have the discretion to do so, thus an alternative would be to negotiate with a departing employee to execute a release.

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