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FALL 2023, VOLUME 21, NO. 4

Let's Make a Deal!

Finding that 'sweet spot'

Nathaly Pinchuk
RPR, CMP
Executive Director

Perspective

When you think about it, there's not much that you don't have to negotiate at work these days. Long gone are the days of command and control in the office. Everyone has a voice today and wants to use it. That means you are likely in negotiations of some sort daily. That may include everything from contract discussions with suppliers, to discussing a vacation schedule with your team to trying to agree on a project deadline with your boss. These situations and others require good negotiation skills and strategy.

We have all learned how to navigate these difficult situations from necessity and practice. But what do expert negotiators have to say about negotiating in the workplace? Most of them claim that the rules are the same no matter what you are negotiating, from big decisions to the day-to-day. If you are clear on your position, you come to the table prepared, you seek a solution and you play fair, you will likely come out ahead.

Let's walk through some of those key elements.

Be clear on what you want
You have to know what you want before you ask the other person or the other side what they want. Get clear about what's important to you and the organization and make the case as strongly as you can regarding why you need it. How far can you compromise on those needs? That's the room you have to negotiate. If there are areas or sub-areas where you may have flexibility, let them be known up front. Otherwise, state your position and listen to what the other side has to say. If the gulf between the parties is too deep, you might even have to walk away. Be prepared for that as well.

Be prepared
Gather all the information you can find which you might need to have a successful negotiation process. If it involves all of the staff and a few are coming as representatives to discuss it with you, take the time to gauge the pulse of the organization. Is there a consensus position among the team members? Talk to other managers who may have faced similar situations and ask them how they dealt with it. All of this will point you towards what professional negotiators call the 'sweet spot'. That's the place where the best deal is to be had in any given negotiation. Find that and you're on your way to success.

Be solution-focused
Your objective is to get a deal--not to score points for or against anyone. If a deal won't be easily reached, you need to have a backup plan to get to a solution. Are there other alternatives to consider? If you can't get what you want, would you be open to a counter proposal? Even if you can't ultimately agree, at least listen. It will establish your credibility with the other people you're talking to. Before you shut down negotiations, maybe take a break and ask to come back tomorrow or next week if you can, to explore other ideas and find a path forward. Be prepared to take half a loaf for now if the full loaf is not easily available. This negotiation is not the end and there may be opportunities to get the rest of the loaf at a later date.

Everyone's a winner
That's the ideal outcome that you should be seeking. Even if you can't give the employees everything they want, they will still be your employees afterward. Look for ways that can be of benefit to both sides. Seek out a win-win solution. Even if it's hard work to get there and even if you have to compromise a little, this will be so much better in the long run. Win-win negotiations actually build support and employee loyalty because everyone feels that they are benefitting and will be prepared to support you and the organization with the rest of the teams.

Be fair
Along the same lines, being fair in negotiations enhances your reputation with whomever you are having discussions. Suppliers know that you will treat them as well as you can. Employees will appreciate it if you are honest and upfront in your negotiating dealings with them. Sometimes people try for the quick win by undercutting someone's price or position, but they pay for that in the long run. People have long memories. There's one more thing about playing fair. Don't get angry in negotiations--no matter what. It's not worth it and being a 'tough' negotiator will not get you anything more than extra bumps and bruises which you don't need. Stay cool and get a deal.

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

Brian W. Pascal
RPR, CMP, RPT
President

President's Message

R.E.S.P.E.C.T.

Earn it before you expect it

A respectful workplace is a productive workplace. It really is as easy as that. I get that there can be intense pressure to meet targets and deadlines. The temptation to rule with an iron fist is real, but this is no way to get results in the long run. It is essential to be mindful of the fact that, as a leader, you set the tone for the standard of conduct within your working environment. The way you treat your employees will directly impact how they treat one another and how they treat you too.

Crucially, a respectful environment will also prevent everyday workplace issues from escalating into major problems. The fact of the matter is that sometimes things don't go as planned. If you've established that you're willing to be flexible and rational, it will help employees deal with unmanageable situations rationally without losing their patience. Clients pick up on this kind of clear-headedness too, and it will make your whole operation seem more reliable and trustworthy.

In addition, an environment in which everyone feels respected will also naturally boost accountability and avoid any messy discrimination claims being levelled unjustly. When people trust that they will be treated with dignity when they come to work, it helps to maintain the discipline of an organization. This doesn't mean that constructive criticism has no place at work, but it will be received better if done in a climate of mutual respect.

Ultimately, a disrespectful working environment will simply lead to a situation where a whole lot of time is being wasted. The minutes (or hours) employees spend dwelling on what they feel are poor managerial attitudes will necessarily reduce their performance. When taken to an extreme, disrespect can have a massive impact on productivity, as more and more time is allocated towards conflict resolution. One thing can lead to another, and passive-aggressive emails and gossiping can soon become the norm. What's more, these unfavourable behaviours can be very tricky to kick once they've been given room to fester and establish themselves.

A big part of respect, therefore, is being proactive and addressing issues while they are still in their infancy. Fostering a respectful atmosphere in an organization does not necessarily require an HR policy review or other formal changes - it is a decision on behalf of those in charge to come to work every day and make respect the law of the land.

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

"Since I plan on working for your company for the next 20 years, I was hoping to get all my paychecks up front."

INSIDE THIS ISSUE

Defamation & Workplace Harassment

What happens when these two worlds collide?

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Feature

Lately our newsfeeds have been filled with lawsuits about defamation, censorship and workplace harassment. The Ontario Court of Appeal tackled these issues head on in a recent case that pitted an obligation to investigate workplace harassment against defamation claims arising from the investigation in *Safavi-Naini v Rubin Thomlinson LLP,* 2023 ONCA 86.

This case was an appeal of a lower court decision granting a motion under anti-SLAPP (Strategic Lawsuits Against Public Participation) legislation to dismiss an action alleging that summaries of the findings of a harassment investigation were defamatory.

The Appellant in this case was a medical resident (the "Appellant") at the Northern Ontario School of Medicine (the "School"). The Appellant filed complaints of workplace harassment and sexual harassment against two (2) doctors at the School: one was the director of the Appellant's program and the other was a faculty member. Prior to the investigation, the Appellant issued a press release detailing the allegations in her complaints.

In response to the Appellant's complaint, the School retained a law firm and investigator to investigate pursuant to its obligations under the *Occupational Health and Safety Act,* RSO 1990, c O 1 ("OHSA"). The investigator conducted an investigation and determined that the complaints were unsubstantiated. The investigator prepared two executive summaries which were only provided to two staff members of the School and its legal counsel. The summaries were not publicly disseminated. However, one of the summaries was ultimately disclosed as part of a Human Rights Tribunal of Ontario application brought by the Appellant against one of the doctors involved in the alleged harassment.

Following the investigation, the Appellant brought an action against the School, the law firm and the investigator (collectively, the "Respondents") alleging that the executive summaries were defamatory.

The Respondents brought a motion to dismiss the action pursuant to section 137.1 of the *Ontario Courts of Justice Act,* RSO 1990, c C 43, governing the dismissal of proceedings which limit debate. The purposes of these legislative provisions are to encourage individuals to express themselves on matters of public interest; promote broad participation in debates on matters of public interest; discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. For an action to be dismissed, the moving party must establish that the proceeding arises from expression related to a matter of public interest. If the moving party establishes this criterion, the onus shifts to the responding party to establish that the proceeding has substantial merit, there is no valid defence to the defamation claim, and the public interest in allowing the proceeding to continue outweighs the public interest in protecting the expression.

The motion judge dismissed the action, finding that the proceeding arose from a matter of public interest, a valid defence of qualified privilege existed, and the balance of interest favoured the protection of the disclosure. Qualified privilege arises when a publication is made in the course of a duty, be it legal, moral, or social; the person making the disclosure has a duty to or interest in making the disclosure to the recipient; and the recipient has a duty to or interest in receiving the disclosure. The disclosure must not be motivated by malice or exceed the purpose for which the disclosure was intended.

The Appellant appealed the decision dismissing the action to the Ontario Court of Appeal. The Court of Appeal found that the executive summaries related to matters of public interest, meaning that some segment of the community had a genuine interest in receiving information on the subject. Although the Court of Appeal found that the public has significant concern over sexual workplace harassment and investigations into these issues, the Court was careful to point out that sexual harassment and workplace harassment were of public interest in this case. This is because it was alleged to have occurred in an educational institution and in particular, a medical setting where patient safety was a concern.

The Court of Appeal agreed with the motion judge that there was a valid defence of qualified privilege because there was an obligation on the

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Worst Mistakes Made with Probation

Howard Levitt
LL.B.
Senior Partner, Levitt Sheikh LLP

Ask the Expert

Q *What are the biggest mistakes made by employers in dealing with probation?*

A **1) Assuming that because an employee is employed less than three (3) months, they are probationary.**

They are not. Probation has to be contracted for. The ESA may not require termination pay under ninety (90) days but the courts do. In the *Shtabsky v Dubeta Interiors* decision, a two-week employee was awarded wrongful dismissal damages. There are cases awarding as much as six (6) months to employees who were fired because the employer changed its mind before even hiring them. There is no reason that a court might not award even more on the right facts. Ironically, it is safer to fire employees within the probationary period than before they even commence employment. The probationary term does not commence until they start work.

2) Sending them the contract to sign after the agreement to employ them has already been made, such as on their first day of work. After all, if they have shown up, they must have had an agreement as to the job, including starting date. That is called a lack of consideration and an agreement signed after an oral agreement was already made is unenforceable.

3) Having an agreement that they can be fired without cause or notice for a period of more than ninety (90) days or more than the ESA maximum in the province in question. That will invalidate not only the probationary clause, but the entire termination provision, as the courts have said that if one portion of a termination provision is unenforceable, it voids the balance.

4) Not having a contract providing for the absolute right to terminate employees during the probationary term without cause at any time without payment of termination pay. Simply stating that there is a 90-day probationary period is insufficient. The courts have held that to fire someone during probation, the employer must still establish that the employee's performance is inadequate, although the test is not as stringent as just cause.

5) Forgetting that probation is not a defence to statutory violations. The most common example is discrimination pursuant to human rights legislation, including not continuing employment past probation, for example, because the employee became ill etc. Similarly, you cannot terminate an employee as a reprisal for an employment standards or occupational health and safety complaint. The fact they were probationary is of no assistance.

6) Not firing employees during the probationary period. In the *Cornell v Rogers Cable* case, I successfully argued that Rogers had waited until the day after probation ended and then evaluated and terminated Cornell, so had effectively terminated him as a probationary employee. However, I would not recommend taking that chance. Do it during the probation period, not after. Too many employers do not monitor their probationary periods. Employees can generally "white knuckle" it for ninety (90) days before their deficiencies become evident. But if those deficiencies appear within the ninety (90) days, they likely won't improve and you should use your probationary period.

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Feature cont'd

Defamation & Workplace Harassment

What happens when these two worlds collide?... concluded from page 4

investigator to complete the report and provide it to the School pursuant to the *OHSA*; the School had a duty to receive it; and there was no evidence of malice. The Court of Appeal also agreed that the balancing of interests favoured the protection of the disclosure, upholding the decision to dismiss the action.

Anti-SLAPP legislation is aimed at curbing lawsuits designed to thwart participation in matters of public interest and dissemination of related information. These provisions are often at play in more traditional forums for dissemination of information, like news stories, where the main purpose is to communicate the information to as many members of the public as possible. In contrast, this case occurred in a context in which the purpose of the dissemination of the summaries in question was not to communicate the information to as many members of the public as possible, but only communicate the information on a "need to know" basis. What makes this case interesting to employers, investigators and legal counsel alike is that it confirmed that this provision can be used as a shield to protect against defamation claims arising from legally mandated dissemination of information critical to workplace health and safety.

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Creating a Speak-Up Culture

Get everyone on board and reap the benefits

Shannon Walker
M.A.

President
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Feature

Speaking out against misconduct and blowing the metaphorical whistle is not always easy in the workplace. Fraud, harassment, waste and other misconduct can often fly under the radar of human resources for far too long, ultimately hurting the organization. Now more than ever, employees and external stakeholders demand accountability from organizations. Creating a company culture where everyone is comfortable speaking up against misconduct helps address these concerns and can significantly improve your organization's employee retention. Executive leadership must first understand the core components, the resources needed to support employees and how to implement them for employees to feel comfortable voicing their concerns.

Understanding Speak-Up Culture and Retention Benefits

An organization with a strong speak-up culture has a team of individuals committed to transparency and accountability. Fostering a culture where employees are comfortable communicating concerns from all levels requires inclusive resources and a policy that outlines a commitment to anti-retaliation. Conversely, a lack of appreciation, policy and program support can create an apathetic environment that suffers from chronic inaction.

Like any company culture shift, it takes time to reap the benefits, but they are worth the effort. A speak-up culture is created from the top down, meaning leadership needs to hold those who commit misconduct accountable. Leadership sets the guidelines and provides the resources to allow employees to speak up. Executives must lead by example. Deal with issues efficiently while informing all necessary stakeholders of the process. For sensitive matters such as harassment, that require anonymity, ensure you uphold this. For issues that involve the whole company or investors, lay out the facts to make your commitment to transparency known. Ultimately, when your leadership holds the organization accountable, employees will follow suit and hold themselves responsible for speaking up when they observe misconduct.

Once your employees feel comfortable with one another and trust their management, their work and the company's retention rates will begin to reflect this, primarily because your employees are your best brand advocates. They will be more likely to speak positively about your organization as an excellent place to work and do business with. This leads to better brand recognition which can help vet new talent. Additionally, current client and stakeholder relationships will improve with less churn and more consistent communication.

Tips for Fostering a Speak-Up Culture to Improve Employee Retention

Firstly, you want to make known that regular employee feedback is welcome and encouraged–not just when something goes wrong. Regularly scheduled company-wide surveys are an excellent way to gauge employee satisfaction and determine where to allocate supplementary resources. Asking tailored questions helps to get a pulse on the overall company culture to help mitigate issues before they arise.

Another crucial step that targets employee concerns is through 1:1 meetings with their direct supervisor. These meetings should balance providing employee feedback with allowing the employee to provide their supervisor with feedback on company processes. Topics can range from how they feel about their workload to bringing up more serious concerns that may require escalating to higher levels of management. The time for the employee to speak their thoughts, suggestions and concerns should take up the majority of the meeting.

While 1:1 meetings are great for creating an open dialogue, employees will often want to bring up more severe concerns anonymously. Historically, this is for a good reason. When an employee has factual information that could potentially hurt the company or a colleague or knows of a severe case of misconduct already occurring, they may fear coming forward and having their name suddenly attached to the issue. However, from the organizational perspective, you want to know this information. In these situations, anonymous reporting tools are a vital and tangible resource for employees and external stakeholders to report any issues or concerns. You can implement reporting tools such as a hotline, web intake form or manual dropbox, depending on the nature of your organization and have it monitored internally or externally. The most crucial factor is upholding a high standard of confidentiality and having the necessary anti-retaliation policy in place. Taking the proper steps to determine which reporting tool works for your organization will help ensure it is not misused and that employees trust the system and, in turn, trust the organization.

Even with the implementation of reporting tools, employees need ongoing training and encouragement from management. Advocate for the importance of speaking up by hosting quarterly lunch and learns, where you share sanitized case studies and offer real-life scenarios that assist employees in identifying the behaviours that should be reported.

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Enhanced Protections for Remote Workers and Increased Fines under Bill 79

Ontario will have among the highest maximum fines in Canada

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Feature

On March 13, 2023, the Minister of Labour, Immigration, Training and Skills Development announced proposed amendments to the Employment Standards Act, 2000 (the "ESA") and other related statutes under Bill 79, the Working for Workers Act, 2023. This is the third iteration of this Act responding to the changing realities of the modern workplace, principally in light of the COVID-19 pandemic.

As of May 9th, Bill 79 has currently passed its second reading at Provincial Parliament and will be proceeding to its Third Reading. There have been no proposed amendments, meaning that the current version will likely be the final text of the Bill.

While the Bill will make quite a few changes, today we are focusing on two of the more impactful changes. First, the ESA will be amended to change the definition of an employer's "establishment", mainly affecting how the ESA defines mass terminations. Second, maximum fines are being increased for the Employment Protection for Foreign Nationals Act, 2009, and the Occupational Health and Safety Act. Together, these fines aim to make employers more accountable for violations of these respective Acts, imposing some of the highest fines in Canada.

Changes to the ESA

The first substantial change concerns the definition of an "establishment" under the ESA, impacting the notice requirements for mass terminations.

Currently, the ESA requires employers who are terminating 50 or more employees within a four-week period, from the same establishment, to provide notice to the Director of Employment Standards and to provide enhanced notice to employees under the Regulations. This enhanced notice provides anywhere from 8 to 16 weeks of notice or pay in lieu of notice, depending on the number of employees being terminated.

An establishment currently means either (1) a single location that the employer carries on business, (2) separate locations within the same municipality, or (3) multiple locations where one or more employees at one location have seniority rights over another employee at a different location.

This definition will be expanded to include "a private residence of the employer's employee if the employee performs work in the private residence and the employee does not perform work at any other location where the employer carries on business." (Schedule 1, cl. 2). The practical application of this amendment will be to include an employee's residence within the definition of an "establishment." Whereas remote workers would not have been included in the definition for the purpose of mass terminations, the amended ESA will now include remote workers for the purpose of mass terminations.

Employees who work entirely remotely will now be treated as though they work in a location of the employer from their home office. This has an impact, particularly on the second definition of an establishment. For instance, if an employer terminates more than 50 remote workers within the same municipality, the amended ESA will now treat that termination as a mass termination, engaging the enhanced notice requirements for mass terminations, whereas before the mass termination provisions would not have been engaged.

Although the full impact of this amendment is still unclear, one practical challenge for employers will be ensuring that they keep accurate records relating to their employees' place of work. We have seen throughout the pandemic that many remote workers have moved to other municipalities or even other provinces, without notifying their employer. Given these changes, employers should ensure they keep accurate records of where their remote employees are working, and double check these records before any mass terminations to ensure compliance with the amended ESA.

These amendments to the ESA will take effect the day the Bill receives Royal Assent. Given the pace at which it has made its way through Provincial Parliament, these amendments will likely be in effect sometime this year.

Changes to Maximum Fines under the OHSA and EPFNA

Bill 79 will also increase fines under two other statutes. The Employment Protection of Foreign Nationals Act, 2009 will see an increase in the maximum fine for employers who withhold an employee's passport or work visa. The Act currently has a fine of up to $50,000 for an individual and up to $500,000 for a corporation. Bill 79 will increase the maximum fine to $1,000,000 for corporations, although the fine for individuals remains unchanged.

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Feature cont'd

Creating a Speak-Up Culture

Get everyone on board and reap the benefits ... concluded from page 7

Ensure that you outline how the whistleblower was protected in these cases to help foster trust in the process.

When executive leadership takes the necessary steps to implement employee resources, such as experience surveys, 1:1 meetings and anonymous reporting tools, employees become more inclined to speak up. The benefits are two-fold: employee satisfaction and retention rates increase while a strong and respected brand reputation is upheld.

There is no 'one size fits all' solution to creating a speak-up culture, so listen to your employees and be prepared to implement their feedback.

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Feature cont'd

Enhanced Protections for Remote Workers and Increased Fines under Bill 79 *...concluded from page 8*

Similarly, contraventions of the Occupational Health and Safety Act will see increased maximum fines for corporations. The current maximum fine for a corporation is $1,500,000. Bill 79 will see the maximum fine increase to $2,000,000.

These fines will be among the highest maximum fines in Canada for similar offences under other provincial Acts. The government has stated that the goal of these fines will be to ensure that Ontario's most vulnerable workers are adequately protected.

Both of these changes will take effect on the day the Bill receives royal assent. We will continue to monitor the progress of this Bill as it makes its way through Parliament.

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Managing the Evolving Employment Relationship

Employers beware the substratum doctrine

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Feature

Introduction

Employment relationships often change over time. Rarely does a long-service employee maintain the same position, compensation and responsibilities throughout their tenure. In *Celestini v Shoplogix,* 2023 ONCA 131 ("Celestini"), the Court of Appeal provides important considerations for employers about managing the progression of the employment relationship, particularly where there is a significant evolution in the employee's duties and responsibilities.

Background

Mr. Celestini commenced employment at Shoplogix in 2005 as Chief Technology Officer. The termination clause in his employment agreement limited his entitlements on termination without cause to twelve months base salary and benefits, plus bonus pro-rated to the date of his termination.

A new bonus plan – an Incentive Compensation Agreement ("ICA") – was developed in 2008 for executives such as Mr. Celestini. This ICA significantly changed his compensation from what was set out in his 2005 employment agreement. Notably, the 2005 agreement was not referenced or ratified when the ICA was agreed to. Simultaneously, Mr. Celestini's duties and responsibilities also began to expand significantly.

In 2017, Mr. Celestini's employment was terminated without cause. As per his 2005 agreement, his base salary and benefits were continued for twelve months, and he was provided a pro-rated bonus. Despite this, Mr. Celestini commenced an action for wrongful dismissal.

The Decision

Mr. Celestini's primary argument was that the termination clause in his 2005 employment agreement was no longer enforceable because of the changed substratum doctrine. In other words, the termination clause could not apply because the circumstances at the time of termination – specifically Mr. Celestini's significantly expanded role and compensation – were not contemplated at the time the 2005 employment agreement was entered into.

The motion judge agreed with Mr. Celestini, finding that his responsibilities as of 2008 far exceeded what would have been expected when he began working for the company in 2005. The motion judge also emphasized Mr. Celestini's compensation, which had increased by approximately 173% over the course of his employment. Despite the fact that his title did not change, the motion judge held that the substratum doctrine applied.

The Court of Appeal agreed with the motion judge. It held that there were two fatal flaws in Shoplogix' position that the 2005 employment agreement applied:

1. Shoplogix did not obtain any ratification of the 2005 employment agreement in or around 2008 when substantial changes to Mr. Celestini's responsibilities and compensation were made; and

2. The 2005 employment agreement contained no anti-obsolescence clause, which may have staved off the substratum doctrine.

The Outcome

As a result of the application of the substratum doctrine, Shoplogix was ordered to pay 18 months in lieu of notice, inclusive of base salary, bonus, car allowance and lost benefits, totalling $458,232.00 plus costs and interest.

Takeaways for Employers

The Court provided helpful guidance for employers on how to avoid the substratum doctrine.

First, *Celestini* is a reminder that employers should strategically assess whether an employment agreement should be updated, or at a minimum ratified, not only to account for changes in the state of the law, but also when there are significant changes to the terms and conditions of the employment relationship. This might include promotions, new compensation plans, etc.

Additionally, employers should ensure that their employment agreements contain an anti-obsolescence clause. Such a clause would include language setting out that the terms and conditions of the employment agreement will continue to govern the employment relationship regardless of its length and any changes to the employee's position, compensation or responsibilities, even if such changes are fundamental.

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"Reasonable Alternative Work" and Termination Notice

Increasing the chances for success

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Feature

Section 55 of the Alberta *Employment Standards Code* ("ESC") sets out termination notice requirements for employers when terminating an employee's employment. Subsection 55(2) of the ESC sets out instances where termination notice will not be required. In particular, subsection 55(2)(d) of the ESC states that termination notice is not required when the employee is laid off after refusing an offer by the employer of reasonable alternative work.

However, determining what is considered an offer and reasonable alternative work is not always easy.

There Must be an Offer to Refuse

In order for there to be a refusal, there needs to be an offer in the first place. In *Manning Forest Products Ltd. v Martens,* 2022 CanLII 50893, the employer decided to change part of its operation, but wanted to retain its employees, albeit in different positions. The employer created an internal job posting and selection process for its employees to obtain alternate work following the elimination of their existing positions. The employee did not apply for any of the postings, as he claimed he liked his former work schedule and was concerned that the alternative jobs posted would aggravate his pre-existing back injury.

The Alberta Labour Relations Board explored whether the internal job posting and selection process constituted an "offer" and found that the employees were not "offered" reasonable alternative work. This was because the employer reserved the right to review applications and select from the applications the candidate to be offered a position and it was unclear whether there were other applications, and if so, who the other applicants were. Ultimately, the internal job postings were not clear and unequivocal offers by the employer to the employee.

This is in line with previous Alberta decisions, such as *Varsity Plymouth Chrysler (1994) Ltd. v Lindsey*, 2005 CanLII 51540 (AB ESA), where the Appeal Body found that, "in order to rely on a refusal of an offer of reasonable alternative work in order to dispense with termination notice, I believe the employer must prove that the offer was formally communicated to the employee and that the consequences of refusing it was made clear to him. Ordinarily, that would require a formal written offer with a description of the work being offered with, perhaps, an explanation of the consequences of refusing the offer."

Is the Alternative Reasonable?

In determining whether alternative employment is reasonable, the Ontario Labour Relations Board in its decision, *Casino Rama Services Inc. v Paul*, 2007 CanLII 910, referred to *Re Hart & Cooley Manufacturing Co. of Canada Ltd*, which stated that the test for reasonableness is an objective one, and the question is whether a reasonable employee, under the same or similar circumstances, would have considered the employment offered as a reasonable alternative to employment which they held with the same employer. The circumstances to be considered include:

1. nature of the job offered compared with the one which the employee performed,
2. any express or implicit understandings or agreements between the parties,
3. geographic proximity, or costs of dislocation,
4. comparable wages, benefits, working conditions and security; and
5. any objective personal circumstances which might reasonably militate against the acceptance of the position.

Based on these circumstances, each scenario will need to be assessed based on its own facts.

For example, in *K.O.P.S. Security & Investigations Inc v Miles*, 2014 CanLII 79788 (AB ESA), the employee knew that the employer's contract in Cardston, Alberta would expire soon, and indicated to the employer that he was inclined to accept shifts in the Lethbridge area and in fact worked some shifts at other sites. The Umpire ultimately found that the employee was trained for and was offered shifts at the Lamb Weston job site, and the employee effectively terminated his own employment by his unwillingness to accept shifts at Lamb Weston.

On the other hand, in *Rowlands v Custom Design Installation Ltd.*, 2000 CanLII 13211 (ON LRB), while the duties were not themselves unreasonable, the Vice-Chair found that the position offered represented a substantial reduction of hours of work with little or no overtime opportunities, which the employee previously enjoyed. As a result, it did not qualify as reasonable alternative work.

Key Takeaways:

In order to increase the chances of success with the reasonable alternative work exception to termination notice, an employer should ensure that its offer is unequivocal, in writing, and sets out the consequences for refusing the offer. It will be equally important to ensure the alternative position offered is as similar to the employee's previous position as possible. Otherwise, the employee will likely be entitled to at least their statutory termination notice entitlement.

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Quiet Quitting

Mapping the boundaries for Employees and Employers

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With the post-COVID prevalence of remote work, previously dormant questions such as confronting burnout and recalibrating work-life balance have become a priority for many workers. Such reflection has generated two notable buzz phrases over the last two years: "Tang Ping", a term meaning to "lie flat," which originated in China in April 2021, and "Quiet Quitting," a concept that gained social media traction in the United States in September 2022.

Tang Ping and Quiet Quitting share a common philosophy – it is pointless to go above and beyond at work, so just do the bare minimum to get by. This article will focus on the latter term as it has been more commonly adopted by the North American audience.

To be clear, Quiet Quitting does not involve actual resignation, or even non-performance of work responsibilities; employees simply perform their jobs as described, within their designated working hours, and nothing more. Nevertheless, Quiet Quitting raises at least some yellow flags. A review of the rights and obligations of employees and employers would assist to define each party's boundaries in the Quiet Quitting context.

Employee Rights and Obligations

Employees generally have no legal obligation to excel at their work. Typically, standard employment agreement language merely requires an employee to discharge work duties prescribed by the employer in a diligent and faithful manner.

Further, Employment Standards legislation in most jurisdictions requires overtime pay for hours worked beyond 8 hours in a day or 44 hours in a work week for employees not otherwise expressly excluded from the application of these rules, such as managers. Ontario has taken its legislation one step further by mandating employers with more than 25 employees to implement a policy contemplating an employee's "right to disconnect" from work-related communications after work hours. A collective agreement or employment contract may also introduce additional protections around hours of work over and above statutory protections.

Concurrently, employers have a reasonable expectation that employees will perform their work duties during normal work hours, having regard to the type of work being done. Where an employee is habitually paid for work they have not performed, an employer may have just cause to terminate on the basis of time theft. Such was the case in the decision of *Besse v Reach CPA Inc*, 2023 BCCRT 27. Likewise, an employee who routinely refuses to comply with lawful directions may be subject to just cause termination for insubordination.

Because an employer will not owe severance payment to employees dismissed for just cause, employers must carefully document the time theft/insubordination, bring the same to the employee's attention, and engage in progressive discipline prior to dismissing an employee for just cause. Employers are strongly encouraged to seek legal advice before pursuing this route.

Employer Rights and Obligations

Given that Quiet Quitting is not shirking one's work responsibilities or taking unauthorized absences from work, an employer cannot dismiss an employee engaged in this philosophy for just cause, absent additional factors.

That being said, employers have several options available to them to manage Quiet Quitting.

The first option is to do nothing. As stated, Quiet Quitting employees are not absent or underperforming employees. They merely lack the initiative to go above and beyond in their work. Accordingly, while an employer would hope that their employees willingly strive for excellence, there is no real basis to penalize Quiet Quitting employees.

A second option is to review the expectations outlined in the employee's employment agreement and any other relevant employee policies. These expectations should be clear and effectively support the business' goals. However, caution must be taken if any changes are to be made to such expectations as they may be construed as unilateral alterations to fundamental employment terms. Unilateral changes including reducing salary, increasing work hours above those originally agreed upon at hire, and engaging in bullying tactics expose the employer to constructive dismissal claims.

To mitigate the risks associated with (re)setting expectations, an employer may: i) obtain an employee's express consent for the change; ii) provide reasonable working notice prior to implementing the change; and/or iii) offer fresh consideration, such as a salary increase, in exchange for the new expectations.

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Time to Revisit Your Team Vision?

Boost team morale and provide a clear direction for the future

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Next Stage Coaching and Facilitation

Whether you've been managing a team for some time or are new to the role, you need to champion the development of a team vision. Establishing a meaningful team vision involves more than creating and writing words on paper. When the vision is clear and commonly understood, it serves as a means to guide the team's work. It creates an opportunity to establish how the team will work together to serve customers, the organization and themselves. The team vision should be the North Star and serve as the guidepost for everything the team does. The team vision is more than a single statement. It is a narrative description of the desired future state. It is aspirational, something the team values and is dedicated to putting effort in to achieve. Once the team vision is finalized, a plan to help the team move from the current to the future state is critical.

There are several principles to practice and steps to follow when establishing the vision.

Ensure everyone has an opportunity to be involved.

People help to implement what they create. From the beginning of this process, map a strategy to ensure that all team members can participate. Consider the different ways people like to be involved and plan for various ways to get input.

Communicate the plan to arrive at the vision statement.

Help people know that describing a meaningful team vision everyone can support and live by takes time. People can be expected to do individual and group work to discover what is really important for the team.

Start with ensuring the team understands the organization's mission, vision and mandate.

Team members must be able to describe in their own words what the organization stands for and wants to deliver. This understanding will help to contribute to creating their own team vision.

Host a conversation about the organization's values.

All too often, employees know their organization's values by the words they see printed on a brochure or wall plaque. Ask questions to determine if staff can identify the behaviour implied by the stated values. How do they feel about those values? How easy is it to live those values?

Identify the team's values.

Help the team identify, define and understand their values. Take time to move through this process. Start by talking about the different types of values. For example, Patrick Lencioni's book *The Advantage* identifies Core Values, Permission-To-Play Values, Accidental Values and Aspirational Values. A way to explore values might be to describe scenarios and ask staff how they would behave if faced with the situation. Create a long list at first. As people have a chance to define, discuss and demonstrate behaviour, shorten the list to the most important. Ideally the list will be fewer than 10. Make sure to have a complete and agreed description of the value in action. Have people complete a statement such as: "If we are living our values, you should see, experience, feel…."

Ask crucial questions and write the answers as aspirational statements.

Ideally the vision statement will address several elements. Example: "How does the organization view us?" "We are seen as the go-to team." Other questions might include: What do our customers say about us? What are we known for? How do we support each other? How do the technology and other supports available to us enable our work? What do we say about one another? How do we feel about our team? How do we hold one another accountable? Explore all facets of the work and relationships with others to create a complete and compelling vision.

Draft the first version and solicit the whole team's feedback.

What feels right about the statement? Can individuals get behind what's written? How much of a stretch is it between the current and desired reality?

Finalize and post in a prominent area.

Once the work is done, ask each member to sign a copy. Create a wall chart and post it in an obvious spot for all to see.

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Feature

Feature cont'd

Quiet Quitting

Mapping the boundaries for Employees and Employers

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Perhaps a more effective option is to incentivize employees to excel. Where possible, it is advantageous to gain an understanding of the employees' job satisfaction and concerns. Potential incentives include professional development training, dedicated mentorship, mental health supports, salary increases and service recognition.

Lastly, unless otherwise barred by contract or statute, employers still retain the right to dismiss an employee without cause. In without cause terminations, employers need only provide contractual or common law reasonable notice or payment in lieu. While without cause dismissals remain available to employers, the cost of replacing Quiet Quitting employees may outweigh any benefits for the same in tight labour markets.

In summary, Quiet Quitting does not affect employee and employer rights and obligations. Nevertheless, the global popularity of terms like Quiet Quitting reminds both employees and employers of the necessity of upfront, consistent and clear work expectations, as well as the importance of a work environment that actively inspires excellence.

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The power of this as a motivational tool cannot be understated. It also serves as a guide to enable productive conversations when things go awry.

Construct and action a team development plan.

Listen throughout the process for areas where team members feel additional professional development is necessary. Work with them to develop a plan that addresses deficits in knowledge, skill or ability. When you invest in the team, everyone wins.

The end goal is a team that wants to work together, can produce results and serves as a magnet for others who wish to join. Motivation and engagement move positively when the way forward is clear and aligned. Everyone benefits.

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