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SPRING 2020 VOLUME 18, NO. 2

Nathaly Pinchuk
RPR, CMP
Executive Director

Continuous Learning: Stay Open and Keep Growing

You're never too busy to expand your horizons

We know that not all learning has to be done in school. Many of us have also learned the hard way that when we stop learning or being open to learning, we quickly fall behind. That's why it's important to develop an individual program of continuous learning. This is done in several ways, from formal to the very casual way that some people learn new skills today. It can happen in a training room, at a conference or right at your desk. This involves a commitment and some dedication in order to achieve the desired results.

Benefits of Continuous Learning

The many benefits depend on your goals and how much time and energy you are willing to invest. Most top performers are always learning new skills to add to their arsenal. This can help them become more appreciated and better compensated in their current position and also help them get opportunities to move up the corporate ladder.

One key benefit of continuous learning is obtaining and updating professional licenses or certifications. This delivers a sense of personal satisfaction and achievement outside of the workplace. This can also lead to insights and developments that open the door to new opportunities, sometimes in a completely different area. Those who take on volunteer assignments or sit on the executive of their professional associations gain new skills and knowledge to help them move into leadership positions. Not only do you stay fresh and inspired in your current role, but you've gained insights about the competitive marketplace.

Most top performers are always learning new skills to add to their arsenal.

Options for Continuous Learning

Formal learning

This may mean taking a sabbatical or education leave to pursue a new degree. It could also be part of a corporate training initiative at work such as attending conferences and workshops away from the office. Much formal training can be taken electronically through different forms of e-learning that can be carried out anywhere there's an Internet connection. Other variations include mobile learning courses and MOOC's which are massive open online courses that have unlimited participation and open access via the web.

Social learning

Social learning refers to how we learn from others. This can be done at work through on the job training or just by listening and interacting with others. We can learn new things and gain information from colleagues and team members on a project or special assignment or just by doing our own research on the Internet. Some other ways to learn through social interaction might be through coaching and mentoring. Here we have a guide to help us navigate through unknown waters and gain confidence and skills to move into a higher leadership position. A coach may offer more personal support while a mentor would help us gain corporate knowledge about our industry or employer.

Self-directed learning

Self-directed learning is often the most fun way to learn. We can pick and choose what we want to learn and what forum or method to use. Most of us don't have the time or budget to spend 300 hours in a classroom or in front of a computer to obtain a professional designation. Here you can learn and grow at your own pace. Attending industry conferences is another great way to meet industry experts and catch up on the latest trends and developments.

No matter how you decide to learn, stay with it to keep growing and continue on your positive path to success. Check out the spring conferences offered by IPM to help you learn new strategies and expand your own networks. Always keep your continuous learning program alive and growing throughout your career!

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

"The good news is these security officers won't beat you unmercifully while they're escorting you off the premises."

Perspective

Brian W. Pascal
RPR, CMP, RPT
President

President's Message

Sweat the Small Stuff

Pay attention to the details

Everyone tells us to not sweat the small stuff. I beg to differ. Paying attention to detail is the real recipe for success. That means spending the time to get organized and to stay organized at work. You can do that anyway you want — lists, schedules, alarms that go off on your phone. You must pay attention to the details if you want to not just survive at work but thrive and succeed.

That doesn't mean everything has to be perfect. That's not practicable nor likely possible. However, you can limit the damage of the inevitable mistakes by developing your own attention guidelines. My first suggestion is a difficult one for all of us Type A personalities, but stop when you're really tired or frustrated. Come back later when you're refreshed and energized and you may just find the solution to the problem you previously encountered.

Other things that work for me include taking short breaks. Sometimes I'll refuel with a beverage or a snack. When I can, I'll take a walk outside to clear my head. I also like to start early before the world comes crashing in and I do big projects in small chunks. All of these strategies help me stay energized and focused so I can pay full attention to whatever I've decided to work on that day.

This doesn't mean you have to micromanage or focus so much time on the details that you don't get any work done. It's more about making the right decision about the things that need the most attention. Tom Peters, the management and business guru who wrote the great book *In Search of Excellence* talks about paying attention to the 'little things' that have the biggest impact.

You can limit the damage of the inevitable mistakes by developing your own attention guidelines.

What are those 'little things' for you and your organization? Peters was talking about taking a moment to look around every day and to see which things you were doing that you could be doing better. You must pay attention to detail for that to happen in order to get to the excellence levels that Tom Peters is suggesting we can get to at work.

One of the ways we've gotten off track lately is that we have equated order and good routines at work with words like rigidity and bureaucratic. Nobody wants to go back there. But the small things, the regular day to day things that get done daily, are really what adds up to success in business. If it works, keep doing it. Not only that but find ways to make it work better.

By the way, I just took another look at that bestseller *Don't Sweat the Small Stuff* by Richard Carlson. The sub-heading reads "and it's all small stuff".

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

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Discrimination in the Hiring Process – Employers Beware!

Use caution when asking candidates even the simpler questions

Dan Palayew
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Feature

When engaged in the hiring process, employers generally have to exercise a great deal of caution. And when it comes to human rights in particular, employers often run into competing interests and obligations.

For example, on the one hand the Ontario Human Rights Commission encourages the collection of human rights-based data so as to create strong human rights and human resources strategies. However, on the other hand, in *Haseeb v Imperial Oil*, 2018 HRTO 957, the Human Rights Tribunal of Ontario ("HRTO") recently reminded us of the risks employers face when they do ask Code-related questions.

The Facts

Mr. Haseeb was an international engineering student studying at McGill University on a student visa. Following graduation, Mr. Haseeb's intention was to pursue an engineering career in Canada and to use the postgraduate work program as a path to permanent residency.

In 2014, Mr. Haseeb applied for an entry-level position at Imperial Oil. As he had previously heard that Imperial only hired Canadian citizens or permanent residents, he lied on his application and in two subsequent interviews by answering "yes" to the question: "Are you eligible to work in Canada on a permanent basis?"

At the end of the hiring process, Mr. Haseeb was offered the position. However, the job offer was conditional on Mr. Haseeb providing proof that he either was a Canadian citizen or had permanent residency status. He could not do so and consequently, Imperial rescinded its offer of employment.

Mr. Haseeb filed a complaint with the HRTO alleging discrimination on the basis of place of origin, citizenship and ethnic origin.

The Findings

The HRTO, in its decision, zeroed in on the permanence requirement that was attached to the question Imperial asked its candidates during the hiring process. Specifically, the Tribunal found that it amounted to direct discrimination on the basis of citizenship given that it distinguished between candidates who were permanent residents and citizens, and those who were not.

While the Tribunal did acknowledge that employers are indeed legally require to obtain proof of eligibility to work in Canada at the commencement of any employment relationship, the addition of whether or not the eligibility was on a permanent basis breached the Code.

Imperial argued that this permanence requirement was a *bona fide* occupational requirement ("BFOR") and a practice that was integral to their organizational succession plan.

The Tribunal rejected Imperial's BFOR argument. Imperial could not point to a specific task performed by an engineer that was linked to the permanence requirement. Indeed, generally successful BFOR arguments have been safety-related. Moreover, Imperial could not demonstrate that it was essential to succession planning as they had plead. Finally, the evidence before the Tribunal indicated that Imperial had made a number of exceptions with respect to the permanence requirement in the past, specifically where a candidate was highly specialized in their field. The Tribunal therefore found that the practice was optional, rather than a necessary criteria of the job.

Imperial was ordered to pay $120,360.70 to Mr. Haseeb because of its discriminatory hiring practice. The damages represented lost wages, damages for injury to dignity, feelings and self-respect, and interest. No public interest remedies were ordered as Imperial had already taken corrective action with respect to its recruitment process.

Takeaways for Employers

The decision in *Haseeb* is a useful reminder of the exposure that can be associated with human rights in the hiring practice.

Imperial's question pertaining to eligibility to work in Canada is indeed proper and, in fact, it remains a requirement that

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Discrimination in the Hiring Process

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individuals must be legally able to work in Canada before commencing work. However, Imperial's question was problematic because of the addition of two words: permanent basis, which was found to be reflective of a hiring practice that distinguished between citizens, permanent residents and those who are able to work in Canada due to a valid work permit.

While employers are not strictly prohibited from asking Code-related questions during the hiring process, *Haseeb* is a reminder that it should be done only with extreme caution. Moreover, if the decision is made to ask for such information, careful consideration should be given to ensuring that it is done in a manner that is consistent with the Code.

Navigating human rights issues in the hiring process can be tricky across jurisdictions. Legal advice is always recommended in order to limit exposure to human rights claims.

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Ask the Expert

Where is the Truth in Conflict?

The negative impacts on our cognitive abilities

Q: Why is it that the same two people in a conflict situation can view past events in such a different way?

A: I hear the word 'truth' brought forward many times in these conversations, or its opposite — 'you're a liar'.

Parties in conflict often have difficulty being objective about the truth — or sticking to the facts. This is because each person involved has his or her own story or description of the events. People in conflict assign meaning and intent to each action and reaction. A look of despair is taken to be a glare of hatred. A missed call might be interpreted as an intention to ignore or demean another person. Each person reads his or her own meaning into everything — this is often referred to as subjective truth. We use our lens of how we see the world to interpret events. Assumptions are made based on how we interpret people's actions and lead to more assumptions which may be quite removed from the facts.

Ask any varying group of people who have gone through the same experience to describe what happened and you are likely to get many different stories. Police officers on the scene of an accident interview multiple witnesses and often never get a consensus on what happened. The elderly lady whose grandson was hurt by a drunk driver sees the car as "speeding through the intersection". The teenager who dreams about fast cars and admires racing sees the driver as "competent and skillful". These witnesses will see things differently from each other, but both are telling 'their' truth.

We've all heard about the fight/flight/freeze response that is triggered in conflict situations. Studies have shown that when a threat response is activated, it has a severely negative impact on our cognitive abilities. It automatically sends our limbic system into its automated response and fewer resources (oxygen and glucose in particular) become available to the prefrontal cortex. The prefrontal cortex is the part of the brain where conscious thought takes place, our logical thinking and planning. This means that when a threat response is activated, our ability to **understand**, make decisions, **remember**, solve problems and communicate is impaired.

Nature has developed this emotional state to help us stay alive. Our ancestors had to consistently assess the risks around them. The ones that were nervous were very successful — and we are their offspring, sitting atop the food chain. Fear or anger sends signals to all parts of our body to help us fight, flee or sometimes freeze. It energizes us to prepare for action against a threat response. Hence, we come across the same results in our prefrontal cortex when we feel emotionally threatened and our abilities to remember, etc. become impaired. So, one person remembers you pounding a fist on the table in anger or backing away in fear when you have no recollection of this at all.

We need to recognize that multiple perspectives and views regarding a common event can simultaneously be both true and different from each other. That's because of the nature of human beings — we each bring our own histories and lenses to see and understand our world. It's also tied into the science behind how our brains work when we are in conflict and what we are able to understand and remember. So, when in conflict, try to move away from phrases like 'you are a liar' to more fitting phrases such as 'the truth of my experience is'.

Michelle Phaneuf is Partner at Workplace Fairness West and can be reached via email at phaneuf@workplacefairnesswest.ca.

Ask any varying group of people who have gone through the same experience to describe what happened and you are likely to get many different stories.

Michelle Phaneuf will be presenting on
Workplace Restoration: Emerging Psychological Health & Safety Practices
at IPM's May 5, 2020 Calgary Conference.
For details, go to www.workplace.ca (click on events).

When Fixed Terms are Forever: Unexpected Liability for Employers

The Dangers of Fixed-Term Employment Agreements

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Feature

Fixed-term employment agreements continue to hold a special place in the hearts of many employers. These agreements definitely offer some attractive benefits for the employer, but renewals or ambiguous language can cause unexpected liability to rear its ugly head.

Fixed-Term Must be Unequivocal and Explicit

One of the most attractive parts of fixed-term agreements is that upon expiration, the employee is usually not entitled to any termination notice or pay in lieu of notice.

However, because the expiration of a fixed-term employment agreement can have serious consequences for an employee, courts will require employment agreements to have unequivocal and explicit language in establishing its fixed-term nature. Any ambiguity will generally be construed against the employer's interest.

Terminating Fixed-Term Agreements Early

On the other hand, if an employer wants to terminate a fixed-term agreement before its expiration, the employee is often entitled to notice equal to the remaining duration of the fixed-term. This may or may not be to the employer's advantage depending on what is remaining of the fixed-term. Employers may attempt to mitigate this risk by providing an early termination clause but if such clause is found to be unenforceable, that is when liability can be at its greatest.

> Courts will require employment agreements to have unequivocal and explicit language in establishing its fixed-term nature

When Fixed-Terms Break

The potential risks of fixed-term agreements were on full display in a recent Alberta decision, *Lui v. ABC Benefits Corporation*, 2019 ABPC 125. In this decision, the employee held a part-time position working on a specific project. The position was approved until February 4, 2014, with the possibility of extension, and contained a clause that the position may be terminated at any time with 2 weeks' notice. During the project, the position was extended with the new end date of June 30, 2014. On June 27, 2014 the employer advised the employee that her employment had come to an end, and paid her until June 30, 2014.

The employee claimed for her wages for the period from July 1, 2014 to December 23, 2014, because her view was that her position was extended until December 23, 2014. There was conflicting evidence over whether the employer promised further extensions and until what date would the positions be extended. Unfortunately for the employer, there was nothing in writing. The end dates, based on conflicting evidence, varied between end of December, December 23, 2014, December 30, 2014 and even into 2015.

The employee's actions supported her understanding that she was working past June 30, 2014. She did not look for other jobs and she provided her planned vacation dates for December to the employer, but the employer did not advise her that her agreement was expiring on June 30, 2014.

On June 23, the employer also mentioned providing the employee with 2 weeks' notice and having the employee work until July 4. As discussed above, if an agreement is fixed-term, it simply expires on the end date and the employee is not entitled to any notice. The court questioned why the employer would provide termination notice one week before the employee's alleged end date, if the agreement was expiring.

As a result, the court found that the agreement had been extended past June 30, 2014. However, the court did not

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Heads Up Island Employers: Additional Workplace Harassment Obligations Coming Soon!

PEI: It's time to review your sexual harassment policy

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Feature

Summertime in Prince Edward Island will not only bring with it beach days and tourists but, new workplace harassment obligations for employers.

On July 1, 2020, the *Occupational Health and Safety Act* Regulation amendments pursuant to the Occupational Health and Safety Act, RSPEI 1988, c O-1.01, regarding workplace harassment will come into force. Under the new amendments, harassment will be defined as:

- any inappropriate conduct, comment, display, action or gesture or any bullying that the person responsible for the conduct, comment, display, action or gesture or the bullying knows, or ought reasonably to know, could have a harmful effect on a worker's psychological or physical health or safety, and includes:
  - conduct that is based on any personal characteristic such as, but not limited to, race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin, gender identity or pregnancy; and
  - inappropriate sexual conduct that is known, or ought reasonably to be known, to the person responsible for the conduct to be unwelcome, including, but not limited to, sexual solicitations or advances, sexually suggestive remarks, jokes or gestures, circulating or sharing inappropriate images, or unwanted physical contact.

Harassment will also include:

- repeated inappropriate conduct, comments, displays, actions or gestures or incidents of bullying that have a harmful effect on the worker's psychological or physical health or safety; and
- a single occurrence of inappropriate conduct, comment, display, action or gesture or bullying that has a harmful effect on the worker's psychological or physical health or safety but does not include reasonable action taken by an employer or supervisor relating to management and direction of workers or of the workplace.

The amended regulations will require an employer who knows or ought reasonably to know that harassment in the workplace is occurring to ensure that the source of the harassment is identified and the harassment stopped; and that reasonable steps are taken to remedy the effects of the harassment and to prevent or minimize future incidents of harassment.

Employers will be required to keep the details of the harassment complaint confidential, unless, and to the extent that, disclosure is necessary in order to report the incident of harassment or to cooperate in the investigation of the complaint. Workers must also cooperate in the investigation of complaints.

Employers will also be required to develop and implement a written policy to prevent and investigate harassment in the workplace that includes such obligations as a statement that every worker is entitled to a workplace free of harassment; a commitment that the employer shall ensure, as far as is reasonably practicable, that no worker will be subjected to harassment in the workplace; and information or procedures about how to make a harassment complaint to the employer or supervisor, how to make a harassment complaint to a person other than the employer or supervisor, if the employer or supervisor is a subject of the complaint, how a harassment complaint will be investigated, and how the complainant and subject of the complaint will be informed of the results of the investigation and any corrective action that has been or will be taken as a result. A copy of the policy must also be made readily available to employees.

Employers will have an obligation to conduct an investigation into the complaint. Investigations may be referred to an impartial person either within or outside of the

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Feature

Additional Workplace Harassment Obligations

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workplace who is not directly involved in the incident or the complaint; is not directly under the control of the person who is the subject of the complaint or otherwise in a conflict of interest; and has knowledge of the workplace harassment provisions, the amended regulation and other applicable laws.

If an investigation is carried out by an impartial person, that person must make a determination as to whether the harassment occurred and may also make recommendations. If recommendations are made, the employer will be required to determine the corrective action required in the circumstances and implement the corrective action.

These new obligations are in addition to obligations already imposed on employers regarding sexual harassment in the workplace under the Prince Edward Island *Employment Standards Act*, RSPEI 1988, c E-6.2. The obligations under the employment standards legislation are similar in that employers are obligated to make every reasonable effort to ensure that no employee is subject to sexual harassment and it requires employers to issue a policy statement.

In light of the upcoming changes, PEI employers should take a look at their current sexual harassment policy statement and adapt and expand to ensure compliance with the new occupational health and safety requirements.

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Confidentiality Agreements in Harassment Cases: New Global Trends

Are they becoming a thing of the past?

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We are all familiar with an employer's practice of wanting an employee to sign a confidentiality or non-disclosure agreement ("NDA"). Sometimes this is when an employee commences employment. It makes an employee aware from the onset of their employment that the employer wants to protect its business, trade and propriety interests.

Sometimes an employee signs a confidentiality agreement because of issues raised by or about an employee during their employment or because their employment has ended. In those situations, and even if no legal action has commenced, an employer wants an employee to enter into written terms of settlement, including a confidentiality agreement, particularly when there is a monetary payment. Generally, an employer wants to safeguard against an employee disclosing to others that a payment was made or the amount of the payment.

Confidentiality agreements, or NDA's, are also used when an employee raises allegations of harassment. As part of the confidentiality agreement, an employer often wants an employee to agree that they will not: disclose the terms of settlement; discuss the harassment allegations; discuss the facts upon which the allegations are based; or even confirm that there is a settlement. Since the majority of harassment cases are resolved without the facts being made public, in essence, an employer buys an employee's silence.

However, in the era of #MeToo, with more people are coming forward to raise allegations of harassment through the courts, administrative tribunals or the media, confidentiality agreements and NDAs are coming under scrutiny. The days of keeping harassment allegations and subsequent terms of settlement confidential may be coming to an end.

Legislatures in the United States and the United Kingdom have introduced or are considering introducing new legislation to limit confidentiality agreements and NDAs in sexual misconduct cases. They are concerned that employers are trying to silence those who come forward with legitimate allegations of harassment, intimidate whistleblowers, or conceal serious harassment and discrimination incidents, particularly those involving senior company executives.

Further, they believe that confidentiality agreements mean that a victim is unable to discuss an issue with other people or organizations, including the police or medical practitioners, including physicians and therapists. This can leave victims afraid to report an incident or speak about their experiences and potentially expose others to similar situations.

To address these concerns, in the last couple of years, sixteen states in the US have introduced bills to limit the use of NDAs in sexual misconduct cases and those bills have been passed into law in eight of them, including: Arizona, Maryland, New York, Tennessee, Vermont, Washington and California.

Effective January 1, 2019, California's *Code of Civil Procedure* was amended to prohibit any provision in a settlement agreement that prevents the disclosure of factual information regarding: acts of sexual assault; sexual harassment under the *Civil Code*; workplace sexual harassment; workplace sex discrimination; failure to prevent acts of workplace sexual harassment or sex discrimination; and retaliation against a person for reporting sexual harassment or sex discrimination. California law expressly states that any such provision in a settlement agreement entered after January 2019 will be considered void as a matter of public policy. The law applies to private and public sector employers.

The United Kingdom is also taking steps to prohibit confidentiality agreements and NDA's in harassment situations when on March 4, 2019, it introduced new rules around them. For the first time, it enshrines in law that individuals cannot be prevented from reporting crimes, harassment or discrimination to the police. It also extends the requirement that

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Feature

Feature

Confidentiality Agreements in Harassment Cases

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individuals must receive legal advice about limits on confidentiality agreements before entering into them. The British government warns that employers who do not comply with the new confidentiality clauses will have the entire settlement void, such that the terms of settlement can become public.

But what about in Ontario? Will there be similar restrictions introduced for harassment settlements? It's hard to tell.

In the last decade, as we all know, Ontario has introduced changes in the *Occupational Health and Safety Act* for employers to address workplace violence and harassment, including sexual harassment.

In 2016, the *Limitations Act* was amended to eliminate limitation periods for proceedings based upon sexual assault, or other types of sexual misconduct where the person alleged to have committed the misconduct was in a position of trust or authority in relation to the person with the claim. This includes members of management.

In the 2018 Ontario Superior Court decision of *Watson v. The Governing Council of the Salvation Army of Canada*, the court treated release language in a settlement agreement differently after the employee received the benefit of the settlement and was paid. She then raised allegations of sexual harassment about her former manager, who tried to have her claim dismissed on a summary judgment because of the release language.

The court held that the scope of the release was the employment relationship and that allegations of sexual harassment and intimidation were not included in the release, were not connected to employment. The court held her claim was not barred by the release.

Despite these changes, there is no word in Ontario on whether confidentiality agreements will be prohibited, or their use limited, in harassment situations. But based upon the new laws in other countries, those changes may be fast approaching.

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Feature

Those Employment Standards: They are Changing

Make sure your termination language is enforceable

With many provinces and territories undertaking reviews and enacting changes to Employment Standards legislation, it's essential for employers to anticipate and respond to upcoming legislative changes. While legislation with true *retroactive* effect is less common and must be specifically identified, most legislative changes will have an immediate effect, changing the law going forward. This can create implications for agreements which start under different legislative terms than they finish; contractual language which ***was*** compliant with Employment Standards legislation at the time the contract was entered into may not be compliant at a later date. While in many cases changes are relatively incremental and failure to respond to such changes will be easily addressed through provision of some retroactive pay or benefits, other changes, such as changes to entitlements on termination, can have more dire consequences if overlooked.

A properly drafted termination provision is a crucial element of an employment agreement or letter of hire. In the event of a termination without cause, which represents the vast majority of terminations given the high just cause standard, an employee will be entitled to reasonable notice of the termination, or pay in lieu of notice. The provision of pay in lieu of notice is much more commonly used by employers as compared to a period of working notice. In the absence of language in a letter of hire or employment agreement which specifies an employee's entitlement to notice or pay in lieu thereof upon termination, an employee will be entitled to reasonable notice or pay in lieu calculated in accordance with the common law. Common law entitlements are universally more generous than Employment Standards minimums; it is not uncommon for the common law to provide in ***months*** what the relevant code or act provides in weeks. As such, the inclusion of a well-drafted termination clause can ***significantly*** limit an employer's exposure for notice or pay in lieu thereof.

As most employers are aware, Employment Standards legislation provides the minimum entitlements for employees in each province or territory. These minimum standards are implied at law into every contract of employment. While employers are at liberty to provide greater benefits to employees, they are obligated to provide, at a minimum, those benefits and entitlements specified by the applicable code or act. In the event that the termination provisions of an employment agreement fail to provide the applicable statutory minimum entitlement, the ***entire termination provision will be rendered unenforceable***, exposing the employer to providing common law notice. As such, careful attention should be paid to any changes to the statutory minimum entitlements on termination.

We provide below some key tips for assessing your existing termination language in letters of hire to best ensure effectiveness and enforceability in the long term:

- If your termination clause uses a formula for notice which increases by some increment based on the employee's years of service, ensure that the formula does not, at any time, provide or have the potential to provide less than the statutory minimum;
- If your termination clause uses the Employment Standards minimums "formula" for notice, instead of reproducing the current statutory formula into your letter of hire, refer instead to the provision of notice or pay in lieu of notice in accordance with the relevant Employment Standards minimums, ***as amended, repealed or replaced from time to time***. Attach the current section of the code or act as a schedule to the offer, and refer to the schedule in the termination provision;
- Make ***abundantly clear*** in the termination provisions that the notice or pay in lieu thereof provided pursuant to your termination clause completely satisfies your obligation to provide notice

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Employment Standards: They are Changing

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or pay in lieu thereof, and that no additional notice or pay in lieu of notice beyond the statutory minimums will be provided. Simply indicating that notice will be provided "in accordance with" or "as per" the employment standards legislation will ***not*** be enough to prevent the employee from pursuing their greater entitlement at common law;

- Ensure that your termination language clearly addresses whether pay in lieu of reasonable notice will be inclusive of benefits; in the absence of language clearly limiting the employer's obligation to provide base salary only, pay in lieu of reasonable notice will be read to be inclusive of all benefits (pension contributions, extended health, etc.) to which the employee is entitled to over the reasonable notice period;
- Further to the point above, if the provision of benefits is statutorily required over the legislated notice period, as is the case in some provinces, ensure that your termination language meets this obligation;
- Preserve your ability to offer either working notice or pay in lieu of notice; while working notice is less common and in many cases, impractical, in the event of a dissolution or restructuring, the ability to provide working notice will be valuable; and
- Include an explicit reference to the employer's right to terminate for just cause.

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George Raine

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Power: The Key to Understanding Workplace Harassment

Harassment isn't just about hurt feelings

We're hearing a lot about harassment lately and many managers walk on eggshells, worried that a wrong choice of words or a forceful action in the workplace will lead to harassment complaints. Too often harassment has become weaponized — a useful accusation and a lurking threat to be wielded against managers and co-workers if one does not get one's way.

Part of the problem is the way we write our respectful workplace policies. Such policies typically begin by saying that harassment is "unwelcome behaviour that is known or should reasonably be known to be unwelcome." If this definition were left as it stands, virtually any unpleasant workplace experience would be harassment.

The right to work without harassment is NOT a guarantee of perpetual happiness. Not every microaggression is harassment. Labour arbitrator Heather Laing said it well in an oft-quoted 1995 decision <British Columbia and B.C.G.E.U., (1995) 49 L.A.C. (4th) 193 (Laing)>:

> "I do not think that every act of workplace foolishness was intended to be captured by the word 'harassment.' This is a serious word, to be used seriously and applied vigorously when the occasion warrants its use. It should not be trivialized, cheapened or devalued by using it as a loose label to cover petty acts or foolish words, where the harm, by any objective standard, is fleeting. Nor should it be used where there is no intent to be harmful in any way, unless there has been a heedless disregard for the rights of another person and it can be fairly said "you should have known better."

Harassment policies generally add illustrative lists of behaviours, with lines like "Harassment can include hurtful or demeaning comments and gestures, isolating or shunning behaviours, etc., etc. etc." As a result, many harassment complaints tell the story of what happened and then attach the appropriate label from the list of harassment examples in the applicable policy, for example: "On this date, I entered the meeting room and my manager did not greet me, thereby shunning me. Later the same day he said that I was late for the meeting which was a hurtful and demeaning comment."

It's time to get clear about harassment.

True harassment is about power and domination. The harasser seeks to alter the social order of the workplace, asserting domination over their victim. You have to look for the power dynamic.

A moment's rudeness may hurt without constituting harassment. Take the following example. An employee reacts to a co-worker's suggestion in a meeting by saying "That's stupid". Perhaps that's harsh, but you're overlooking a bunch of possible outcomes. Without a doubt, the comment is hurtful and the person who said it should be taken aside and coached in respectful communication. But the comment does not establish harassment, even though it is objectively hurtful and unwelcome.

Now, if the same employee repeatedly directs the same sort of comment towards the co-worker, there is a probability that the employee is not merely guilty of "petty acts or foolish words," but is trying to diminish the co-worker's status in the workplace. Then we'd have harassment.

Repeated conduct is not essential to harassment. A single act can make the power dynamic obvious. Imagine, for example, that the employee had said, "That's stupid. I can't believe they gave you that job. It's breathtakingly dumb." The whole tone of the statement shows that the speaker is trying to diminish the co-worker. It's harassment.

Focusing on the power dynamic is particularly helpful when managers are accused of harassment. Managers are expressly authorized to use power for certain purposes, so merely being upset that a manager used their power isn't instant harassment. Let's say

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Feature

Continuations...

When Fixed Terms are Forever

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accept the employee's claim that it was extended until December 23, 2014. Due to conflicting evidence, it was unclear when the specific end date actually was. With such ambiguity, the court found that the employment was actually of an indefinite term.

Once the employment relationship was found to be of an indefinite term, the early termination provision in the agreement that provided only 2 weeks of notice was void, because it could potentially offend section 56(c) of the *Employment Standards Code*. For example, after 4 years of service, the employee would have been entitled to 4 weeks of notice. However, in this instance, it was actually beneficial to the employer to classify the agreement as indefinite rather than as a fixed-term until December. Since the employee only worked for 8 months, performed a job that did not require specialized skills and was relatively young, she was only awarded 3 weeks of reasonable notice.

This will not always be the case, especially if an employee has many years of service through successive fixed-term agreements. For example, the employer in *Ceccol v. Ontario Gymnastic Federation*, 2001 CanLII 8589 (ON CA) was not as lucky. In this decision, a nearly 16-year employee who worked through a series of one-year agreements was found to be employed on an indefinite employment agreement. The agreement did not contain a clause for termination without cause. This resulted in 16 months of reasonable notice awarded to the employee.

Takeaway for Employers

Thinking that no notice is required to be given to an employee when their fixed-term agreement expires may often lead employers into a false sense of security. Employers should seriously think about whether to take a chance on fixed-term agreements, or to hire an employee on an indefinite basis with an enforceable termination clause to properly manage this risk. If fixed-term agreements are a must, the employer should ensure that the agreement is unequivocal and explicit regarding the fixed-term and include an enforceable early termination clause. In addition, employers should try to limit renewals and maintain proper written documentation that clearly records the specific end dates if renewed.

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Workplace Harrassment

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that a manager has a duty to assess the work of employees in an attempt to constantly improve their performance. If that manager compels an employee to attend a performance evaluation and then gives a negative and therefore hurtful performance appraisal, the manager has used their power and it has caused hurt yet it is not automatically harassment.

In these "abuse of authority" cases, look at whether the use of power was necessary to carry out a job duty in good faith. Was the power or authority being used for the purpose for which it was given in the first place? In the example of the hurtful performance review, ask whether the manager was genuinely trying to improve performance but chose the words poorly. If so, there is no harassment. However, if it is clear that the manager was really trying to get the employee to quit, the power was not being used in good faith to improve performance. You then have abuse of authority harassment.

Always remember that harassment isn't just about hurt feelings. It's about power.

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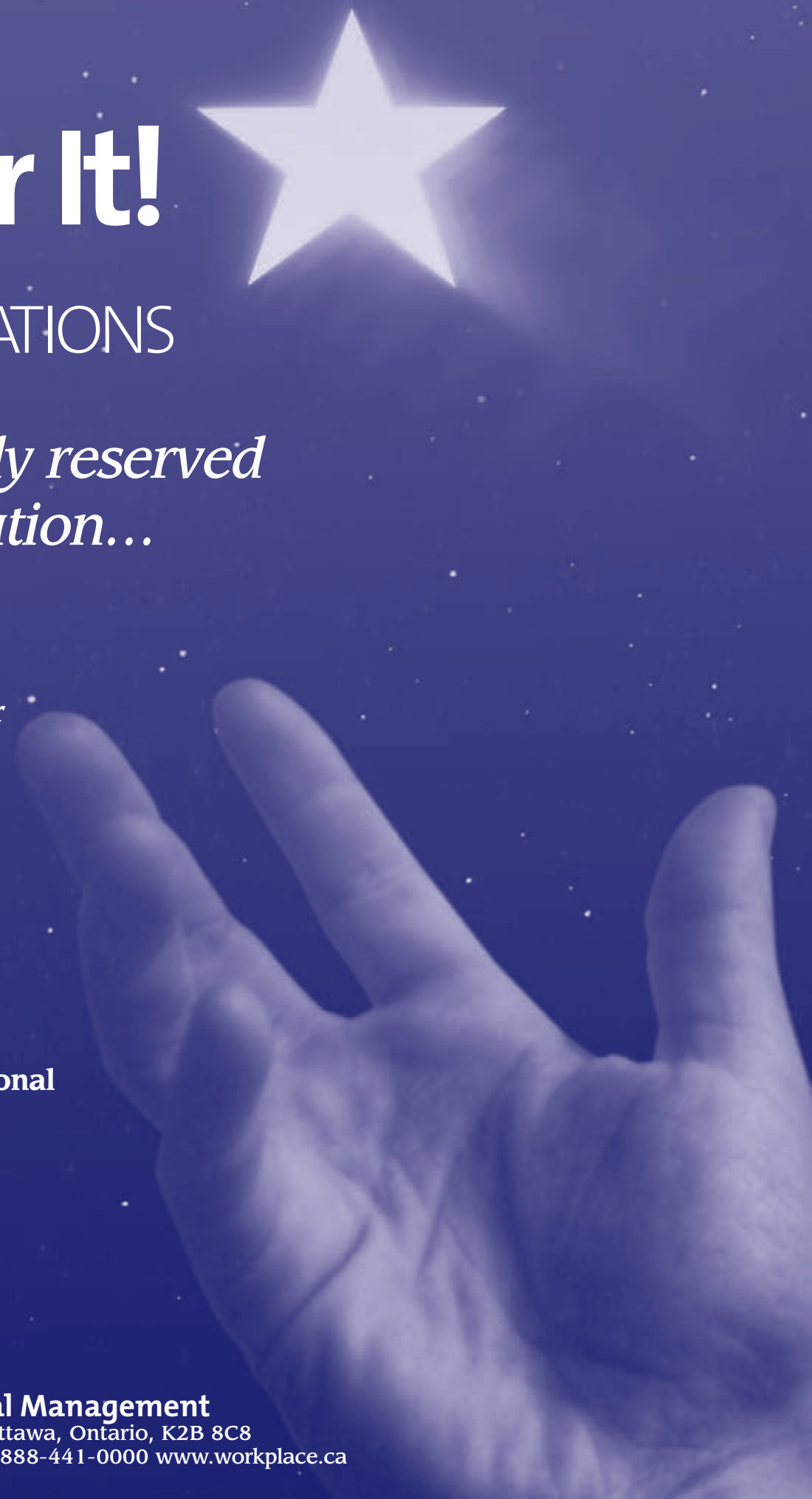

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