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FALL 2020 VOLUME 18, No. 4



Nathaly Pinchuk  
RPR, CMP  
Executive Director

# Career Shift: Don't Jump Ship Too Quickly

*Consider all options before making your next move*

Is it time for you to make a career move? Here are few things to think about before you jump ship and one big piece of advice. Don't burn any bridges behind you. It will be much easier for you in your new job and you never know if you may want to go back to your old employer.

If you have been thinking about it, you are probably ready to take on another role, maybe even another career. There are a few telltale signs that you are ready to move on. If you're not enjoying your work or you're bored most of the time, it's a good indication that you need a new challenge. We spend way too much of our lives at work not to feel like we're making a contribution or that our efforts make a difference.

If you feel stuck in your job and can't see a path to promotion or advancement, that's not good either. If you think you have more to offer and would like to grow and develop your career, you may have to start looking outside. There could be

dozens of other factors to consider including the current work location, turmoil in the industry or just bad management. All of these are good reasons to look for another job. You might just be ready for a change.

Before you start plotting your departure, you should ask yourself a couple of key questions. Are you running away? If you are in an abusive work environment or don't feel that you have the support you need, then by all means get out quickly. However, you should keep in mind that wherever you go, you bring yourself with you. Leave for your reasons- the right reasons and you will likely be successful. If you only want out because of one person or one project or because you feel uncomfortable, those very same situations or people may show up at your next job.

Secondly, is the timing right for a move? There are many considerations on this front. What is the status of any company pension? Do you have bonuses coming due soon?

What is happening with the economy and in your industry? Take a few moments to scan the current environment and your own personal situation. Can you afford to leave right now or would it be better to wait until next year? Make a list and check it twice.

Are you ready? Now you need a plan. It should start with sharpening your focus. There are too many options and too many rabbit holes to fall into when it comes to online job searching. Find a couple that specialize in your area and stick with them. Get back to work on building your personal brand. Freshen up your LinkedIn profile and other professional sites. Reach out to your connections and give them a heads-up.

Make a short list of the organizations that truly interest you. Check out their websites and sign up for their newsletters or social media feeds. That way you'll know when there are active job openings. Before you submit any applications, make sure your resume is clean and up to date. Add all your latest experience and don't forget to include your volunteer or extracurricular activities. They all count.

If you do everything right, you will likely get that job offer. When this happens, remember that you still have a choice. You can take it and move on or take a few days to reflect on it. Are you really ready to move or can you renegotiate the conditions of your current job to make it attractive enough to stay? That choice is always yours.

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



*"It says on your resume that you want to work very little and get paid a lot. I do admire your honesty."*

Perspective



Brian W. Pascal  
RPR, CMP, RPT  
President

President's Message

# You Don't Need to be Friends with Your Employees

*Strike the right balance as a manager*

Most of us start out wanting everyone to like us. Then we become managers or supervisors and realize that this is neither practical nor possible. But growing into a new managerial position, it is often difficult to navigate the spectrum of co-worker into an authority figure. This can be tricky. You need to be able to discipline when necessary, but you also don't want to turn your employees off by lording over them relentlessly. Striking just the right interpersonal chord is crucial for both your fulfillment and theirs. Find the right balance and you just might find yourself in a place where people both like and respect you.

This does not mean you shouldn't make an effort to get to know your team. You may not want to become best friends, but that doesn't mean not having a clue about who they are outside of work. In fact, getting to know your employees on a personal level, while not getting too personal, definitely has its advantages. Asking some questions from time to time will help you uncover both their talents and motivations while putting you in a better position to manage different personalities. This will certainly help when you try and resolve the inevitable conflict of personalities.

Knowing about big events in their lives will also give you confidence in conversation and will help you anticipate how their performance may be affected. Asking how someone's weekend was and actually listening to their response will not mean that you have to cast off your boss hat forever. However, you should avoid them on social media. While a casual lunch or workplace conversation can help you become a better manager, being Facebook or Instagram friends with your employees is never a good idea, at least in my opinion. Forming social network relationships can quickly land you in some uncomfortable situations. Do you really want to see everything going on with your employees? Furthermore, do you want give them a window into your personal life? I didn't think so.

Remember you're there to do a job and if you do slide into that "please like me" category, it is important to always remain mindful of your role. In the workplace, it's more important to be a boss than to be a friend. That's why they pay you the big bucks.

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

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Feature

# Ignorance is Not Bliss in the Duty to Accommodate

*Failure to inquire costs employer over \$50K plus reinstatement*

It is well established that an employer has a duty to inquire into their employee's mental and/or physical disability if they know or ought to have known about it and provide reasonable accommodation to the point of undue hardship. Willful blindness is not an option and failure to properly inquire and provide appropriate accommodation is a violation of the *Alberta Human Rights Act*. That said whether or not the duty to inquire is triggered will be fact dependent in relation to whether the employer had enough information to suggest that the employee may be suffering from a medical condition which requires accommodation.

In the recent Alberta Human Rights case, *Pratt v University of Alberta*, 2019 AHRC 24, the Commission stated the following regarding the duty to inquire:

The common thread running through all of the case law put before the Tribunal is that findings with respect to the employer's duty to inquire as to whether an employee is suffering from a disability will be heavily dependent on the facts of each particular case. In some cases, a change in behaviour over time may necessitate such an inquiry but in others, information with respect to an employee's isolated demeanour may be sufficient. In some cases, an emotional presentation that leads an employer to make recommendations for counselling may trigger a duty to inquire and in others even a history of serious illness may not be sufficient.

Further, should the circumstances dictate, a duty to inquire

into potential medical conditions may arise, notwithstanding the employee's poor performance or failure to disclose.

In the *Pratt* case, despite the AHRC Tribunal finding that the performance concerns of the employer were valid and substantiated by the evidence (including the employee engaging in personal conversations, being late on three occasions and making personal calls and texts), discrimination was established as a result of a failure to inquire and discharge the duty to accommodate. In *Pratt*, the circumstances were such that the employer was given enough information to trigger their duty to inquire. In particular, the AHRC Tribunal accepted that the employee advised her employer that she was struggling with simple tasks, could not concentrate or absorb information, was seeing a counsellor and had sought support from family. In light of this disclosure, further information should have been sought by the University in order to provide accommodation. There was no evidence to suggest the University fully explored accommodation options prior to terminating the employee for poor performance.

In order to properly accommodate, an employer must sufficiently inquire into the employee's restrictions, even if limited information is initially provided by the employee. A failure to give proper consideration to the issue of accommodation, including what, if any, steps could be taken to modify the employee's current role or find another role in the organization constitutes a failure to satisfy the duty to accommodate. An employer is not necessarily expected to

create an entirely new role or incur significant financial cost, and in such cases would need to demonstrate that to do so would create undue hardship. However, it is typically expected that the employer will incur some hardship in the accommodation process.

Notably, the outcome in *Pratt* demonstrates that a failure to inquire can be costly. Specifically, the Commission ordered reinstatement of the employee (despite her employment being probationary and having ended 7 years prior to the AHRC decision), payment of lost wages for 18 months in the amount of \$34,795.40 and general damages in the amount of \$20,000.00 for injury to dignity and self-respect.

While every case will be fact dependent and we encourage employers to seek circumstance specific legal advice, generally speaking, there are some practical steps that employers can take to discharge their duty to accommodate and avoid an outcome similar to *Pratt*:

- Where potential health and/or behavioural concerns arise with an employee (even if such concerns appear to be minor), an employer should inquire as to whether the employee requires assistance or accommodation in order to properly discharge their duties.
- Obtain all relevant information about the employee's disability, at least where it is readily available. It could include information about the employee's current medical condition, prognosis for

*continued next page...*

# Ignorance is Not Bliss in the Duty to Accommodate

... concluded from page 4

- recovery, ability to perform job duties and capabilities for alternate work;
- Evaluate the employee's capabilities, skills and qualifications in light of any required modifications or restrictions;
- Analyze modifications to the employee's role which can be made, while still accomplishing the employer's work-related purpose;
- Canvass available alternative positions, which may differ from the position the employee currently occupies, in light of the necessary requirements for such a position; and

- Record this process in detail in order to document the accommodation steps taken.

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**Monika Jensen**  
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# Overcoming Unconscious Bias in the Workplace

*How to address this serious workforce issue*

Unconscious bias is hitting the news. From Bay Street to Main Street to Starbucks, the impact of unspoken bias is real and harmful to the workplace. Bias stands in the way of making correct decisions in hiring and promoting. It also has a vital impact on your staff and the workplace in general. Let's explore how we can become aware of our own bias and stop it in the workplace.

First, let's define it.

"Unconscious bias refers to a bias that we are unaware of, and which happens outside of our control. It is a bias that happens automatically and is triggered by our brain making quick judgments and assessments of people and situations, influenced by our background, cultural environment and personal experiences." (ECU: 2013 Unconscious bias in higher education)

We all have a bias. How do we identify it and then what do we do about it? In addressing unconscious bias, employers can assist in creating an inclusive, civil and respectful workplace.

Research indicates that unconscious biases are prejudices we have, yet are uninformed of. They are "mental shortcuts based on social norms and stereotypes." (Guynn, 2015). Biases can be based on skin colour, gender, age, height, weight, introversion versus extroversion, marital and parental status, disability status (for example, the use of a wheelchair or a cane), foreign accents, where someone went to college and more (Wilkie, 2014). If you can name it, there is probably an unconscious bias for it.

Hence if we think we are unbiased, we may have unconscious adverse thoughts about people who are outside our own group. If we spend more time with people from other groups, we are less likely to feel prejudice against them.

This universal tendency toward unconscious bias exists because bias is rooted in our brain. Research shows that our brain has evolved to mentally put things together to make sense to us. The brain sorts all the information it is blasted with and labels that information with universal descriptions that it may rapidly access. When we categorize these labels as either good or bad, we tend to apply the rationale to the whole group. Many of the conclusions are taken from previous experiences and learnings.

In an article, "The Real Effects of Unconscious Bias in the Workplace", a few of the known unconscious biases that directly impact the workplace include:

- Affinity bias is the tendency to warm up to people like ourselves.
- Halo effect is the tendency to think everything about a person is good because you like that person.
- Perception bias which is the inclination to form stereotypes and assumptions about specific groups that make it awkward to make an objective judgement about members of those groups.
- Confirmation bias is the openness for us to pursue evidence that sanctions our pre-existing beliefs or experiences.

- Group think is a bias which occurs when people attempt to fit into a specific crowd by mirroring others or holding back opinions and views. This results in individuals losing part of their characteristics and causes workplaces to miss out on originality and creativity.

Horace McCormick's research found more than 150 identified unconscious biases, making the task of rooting them out and addressing them daunting. For many organizations however, identifying as many as possible and eliminating them has become a high priority.

You can address discrimination issues by increasing your awareness of your unconscious biases and by developing strategies that make the most of the talents and abilities of your team members.

Unconscious behaviour is not just individual – it influences organizational culture as well. This explains why so often our best attempts at creating corporate culture change with diversity efforts seem to fall frustratingly short – to not deliver on the promise they intended.

## **What you can do**

- Be aware consciously of your bias
- Focus more on the people, on their strengths
- Increase exposure to biases
- Make small changes
- Be pragmatic
- Challenge stereotypes and counter-stereotypical information
- Use context to explain a situation

*continued on page 15...*



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Feature

# Release or No Release? Federal Court of Appeal Upholds Employee's Rights

*Employee who signs a full release of claims not barred from bringing unjust dismissal claim*

A release prohibiting employees from bringing claims is often seen as a safety net for employers who terminate the employment of employees. If enforceable, it also often has the desired effect. However, a recent decision of the Federal Court of Appeal confirms that this will not always be the case.

Whether or not a settlement agreement that contained a provision releasing the employer from any claims related to the termination of the employment of an employee was a bar to filing an unjust dismissal complaint was at issue in *Bank of Montreal v Li*, 2020 FCA 22 (CanLII).

The respondent, Ms. Li, worked for the appellant Bank of Montreal (the "Bank") for nearly six (6) years when her employment was terminated. On termination of her employment, Ms. Li was provided with the option of either salary continuation for eighteen (18) weeks or a lump sum payment in exchange for signing a settlement agreement. Ms. Li did not consult legal counsel but sought advice from a friend who was a labour lawyer in Ontario. Ms. Li opted to receive the lump sum payment and signed the settlement agreement. In signing the settlement agreement, Ms. Li released the Bank from all claims arising from the termination of her employment.

Not long after signing the settlement agreement, Ms. Li, a federally regulated employee, filed an unjust dismissal complaint pursuant to the *Canada Labour Code* (the "Code"), which is the employment standards legislation that governs federally regulated employers and employees.

The Bank challenged the complaint on the basis of the adjudicator's jurisdiction to hear the complaint as a result of Ms. Li releasing the Bank from any and all claims pursuant to the settlement agreement. The adjudicator determined that an agreement to release the Bank of all claims is not a bar to a complaint under the *Code*. The adjudicator's decision was in line with earlier decisions of the Federal Court and Federal Court of Appeal following this reasoning.

The Bank sought judicial review of the adjudicator's decision by the Federal Court. The Federal Court dismissed the Bank's application for judicial review, finding that the adjudicator's decision was reasonable and that decisions which differ from the earlier decisions relied on by the adjudicator were bad law. The Federal Court rejected the Bank's argument that other regulatory regimes allow individuals to release claims for breaches of statutory rights on the basis that the language in section 168(1) was different and that the law was unsettled. Section 168(1) of the *Code* is a "notwithstanding clause" giving benefits provided to employees under the *Code* priority over contractual arrangements like the release, unless the contractual arrangement is more favourable to the employee:

168 (1) This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the

employee than his rights or benefits under this Part.

These types of clauses are also found in provincial employment standards legislation. For example, section 6 of the Nova Scotia *Labour Standards Code* contains language that is nearly identical to the language in s.168(1) of the *Code*.

The Bank appealed to the Federal Court of Appeal. The only issue for the Federal Court of Appeal to decide was whether the adjudicator erred in following the earlier decision that found an agreement to release an employer of claims does not prohibit an employee from making an unjust dismissal complaint under the *Code*. The Bank argued the Federal Court of Appeal should decline to follow the reasoning in earlier decisions for three (3) reasons: 1) earlier decisions ignore the common law principle permitting retrospective waiver of rights; 2) there are compelling reasons to allow retrospective waiver of rights; and 3) overturning earlier decision will foster certainty and predictability. Applying the reasonableness standard of review, the Federal Court of Appeal found that the adjudicator's decision was reasonable and rejected the Bank's arguments. The Federal Court of Appeal rejected the Bank's first argument that prospective and retrospective waiver are distinguishable and noted that it was not clear whether Ms. Li was aware of the rights she had under the *Code* when she signed the release. The Federal Court of Appeal also rejected the Bank's argument that allowing complaints to proceed despite a

*continued on page 15...*



Gail Boone  
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ASK the Expert

# Today's Best Managers: What Makes Them Great

*Building ideal relationships with employees*

**Q:** Have you ever wondered what employees really want? What's involved in building these ideal relationships with employees?

**A:** If you search Google for leadership or management skills, thousands of results are catapulted to your computer in a nanosecond. Models, theories, articles, books, podcasts, YouTube, the list is endless. How complicated is it? We know employees expect a lot from their managers. Some managers are very successful in building strong results-oriented, satisfied teams. What are they doing well?

While waiting for a client in a coffee shop, I overheard two employees complaining bitterly about their supervisor. I fessed up, told them what I did for a living and asked them if they would be willing to talk about what 'better' would look like. Their answer was not complicated. It is however very hard for some managers to action.

Excellent managers understand who they are, how they show up and the impact they have on others. They have a way of BEING that includes Caring, Compassion, Courage and Conviction, Clear

Communication and are Confident in their Competence without being arrogant. This way of being helps build their own and others' skills to produce results in a positive work environment.

Really effective managers work on themselves first. They are self-aware. They understand and manage their emotions. They respond. They don't react. When people are blind to their own emotions, they are poor at reading them in others. Successful managers frequently ask for feedback to help them build their skills.

They seek to understand their impact on people, issues, situations and teams. They create safety and ask in a non-threatening way. They listen and act on what they hear. Sometimes it is as simple learning the answers to:

- what do I need to keep doing because it works?
- what do I need to fix? Good idea but needs a little work
- what should I stop because it does not add value and may do more harm than good? And finally,
- what should I start doing because it would really make a positive difference?

**Start with CARE.** Caring means to start with the heart. Collaborative managers keenly invested in team building create ground rules for behaviour to build a supportive and trusting culture. Caring also means holding people capable. That means not micromanaging. It does mean enabling people to be responsible and accountable by giving them autonomy and flexibility in their work. Caring managers treat employees as adults who know what to do and how to do it. Caring engenders trust. A culture of trust and support enables managers to work with staff in a way that inspires growth.

**Show COMPASSION.** Compassion goes a long way in shaping how employees think about you and whether or not they will give you discretionary effort. That's the effort between the minimum they have to do and what they are willing to give freely. Compassion is important when catastrophe strikes and with the smaller stuff. Compassion helps when someone needs a day off because a pet passes away, when someone is going through an unusually tough stretch with aging parents or sick children or with an unexpected minor emergency. All too often these

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## Today's Best Managers: What Makes Them Great

... concluded from page 8

types of requests are met with resistance. Saying no to the employee in these circumstances is not forgotten when the moment passes. It sets up a negative tone for the relationship.

**Demonstrate COURAGE and CONVICTION.** These two are game changers. All too often, courage often means telling the truth to power. It means going against the grain. It's often out on a limb saying the hard thing that needs to be said for the sake of the greater good. Employees need to see your courage and to know you have their back. Conviction is sometimes tough. Excellence comes in striking the balance between believing you are right and sticking with it while preserving relationships. It is a fine but critical line. Successful managers are courageous and speak with conviction and humility. They deal in facts not assumption and invite others into the conversation. They also listen with heart.

**COMMUNICATE effectively and CLEARLY.** Successful managers also know what and how to communicate. They constantly develop their communication skills. They are present and attentive to others. They say hello. They engage in small talk about what matters to their employees. They get to know people on a personal level. Sometimes we have to have the soft skill of communication to do the hard thing of conversation. This is where empathy, clarity and conciseness are key. It's important to eliminate the guesswork in conversation. Skilled communicators take the time to address assumptions, clarify misunderstanding and clearly state expectations. They practice other centeredness and look after mutual interests.

**Demonstrate CONFIDENCE and COMPETENCE.** This is not about knowing it all or having to have the answers. It is about being confident and competent in dealings with people and trusting that the answers are in

the room. It is about coming with the right questions to coach and coax people out of their comfort zones, take risks and grow. It's growing with them.

To sum it up, successful managers care and show compassion. The demonstration of compassion enables courage. Courage in balance with conviction creates trust. Mastering skilful communication enables the hard conversations in a respectful, caring and compassionate way. When we have the hard conversations with care and clarity, we build confidence and competence both in others and ourselves. It all starts with self-awareness. It requires leading oneself first before being able to lead others.

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Feature

# Tort of Harassment Continues to be Quashed in Ontario

*Employers still obligated to ensure a harassment-free workplace*

**H**arassment in the workplace is something that most employers will have to deal with at one point or another, be it developing and implementing a workplace harassment policy or actually addressing workplace harassment complaints from their employees.

Despite an arguable increase in the prevalence of harassment complaints in the workplace, the Ontario Court of Appeal ("ONCA") has recently confirmed that the tort of harassment does not exist. In *Merrifield v Canada (Attorney General)*, 2019 ONCA 205, the ONCA confirmed that employees ought to seek remedies under the tort of intentional infliction of mental suffering ("IIMS").

## **The Facts**

The employee, Peter Merrifield, was an RCMP Constable who, at the time, was involved in the unit responsible for protecting federal politicians. Mr. Merrifield's superiors discovered that he had run for the nomination to be the candidate for the Conservative Party in his riding without complying with the applicable RCMP regulations. It was determined that he was potentially in a conflict of interest with respect to his current position, and as a result, he was removed from the unit and reassigned elsewhere.

Later in his career, the RCMP conducted a formal investigation into Mr. Merrifield regarding the use of his corporate credit card. It was determined that his use contravened the RCMP's Code of Conduct.

Mr. Merrifield commenced an action against the Crown seeking damages for mental

distress/extreme emotional distress he allegedly suffered as a result of managerial bullying and harassment.

The trial judge held that the tort of harassment exists in Ontario and also noted that Mr. Merrifield met the conditions for the tort of IIMS.

## **The Appeal**

In reviewing the trial judge's findings, the ONCA held that there is no basis for recognizing the tort of harassment as a new tort in Ontario. The Court did not agree with Mr. Merrifield's argument that the increased social recognition that harassment is wrongful conduct constitutes a compelling reason to recognize the new tort. In reviewing whether the case was one deserving of a novel legal remedy, such as a new tort, the Court held that there were other legal remedies available to Mr. Merrifield to redress conduct alleged to constitute harassment, such as the tort of IIMS.

In coming to this conclusion, the ONCA compared the elements of the tort of IIMS and the proposed tort of harassment. The Court found that there were significant similarities in the elements, the difference being that the tort of IIMS is more difficult to establish as it is an intentional tort and requires proof of causation, whereas the proposed tort of harassment is based in negligence.

The ONCA reiterated the test for the tort of IIMS and outlined that the employee must establish that the conduct of the accused is:

1. flagrant and outrageous,
2. calculated to produce harm, and which
3. results in visible and provable illness.

The ONCA also overturned the trial judge's findings that Mr. Merrifield met the requirements for the tort of IIMS. Specifically, the ONCA held that the trial judge made repeated legal errors in applying the facts to the test. Ultimately, regardless of the fact that there were multiple findings regarding flagrant and outrageous conduct, there was no evidence to establish that the conduct was intended to cause harm, or that the accused knew that harm was substantially certain to follow from the decision to order the investigation into Mr. Merrifield's corporate credit card use. The ONCA also noted that the emotional distress alleged was insufficient to meet the conditions. Therefore, the trial judge erred in finding that the causal connection required to meet the conditions for IIMS was present.

The Supreme Court of Canada denied the appeal.

## **Takeaways for Employers**

Although the ONCA noted that the tort of harassment would not be recognized in this particular case, it did not eliminate the possibility of there ever being a case where it would be appropriate to recognize the tort of harassment.

While the tort of harassment does not exist currently in Ontario, employers are still required under workplace health and safety legislation to provide a harassment free workplace. Further, the tort of IIMS is still available to employees as a legal remedy to redress actions amounting to harassment. However, in order to do so, we know that there must be clear causal evidence in order to make out the tort of IIMS.

*continued on page 15...*



**Michelle Lane**  
Leadership  
Effectiveness Coach  
and Facilitator,  
Vibrant Leaders

ASK the Expert

# 'Being Present' in Every Conversation: A Prerequisite for Effective Leaders

*How to perfect the art of communication*

**Q:** We seem to be hearing a lot about the importance of being 'fully present'. What's this all about and how do we get there?

**A:** Fully present leaders are not just more effective communicators – they are often better leaders. But what is it about being fully present that makes such a difference and how can we become present too?

### **What does it mean to 'be present'?**

'Being present' is about being fully in the moment. Whether it's an intimate conversation with one or a briefing for many, the most effective leaders commit to being present in the moment, paying full attention with their body and mind (thoughts, emotions and feelings). It also means not making assumptions, passing judgement or jumping to conclusions (and being sufficiently self-aware to notice when you may be doing it). In the process, these leaders build the deep awareness and personal connections so essential to effective communications and leadership.

### **What leadership behaviours are key to being present?**

Leaders who are fully present do (and don't do) several things. First, they set aside distractions and interruptions and bring their full attention to the conversation – that's a given. More importantly, they bring their focus and discipline to noticing when their own mind is wandering or jumping to conclusions and bring themselves back to the person in

front of them. Much like a 'full-contact sport', it requires you to be all in, fully in the moment. Easier to say than do! Once you master the skill, you'll see how much of a difference it makes in interpersonal communications. It brings positive feedback from those around you. That's the power of a leader being present.

In sharp contrast, you can also see, hear and feel it when a leader is not fully present, and the interpersonal connection is broken (or wasn't made at the outset). Mentally, they might be miles away, preparing for their next meeting or rehashing the one they just had. They may be looking right at you, but wrapped up in how they're going to respond before you've finished speaking. As you likely know from experience, it's hard to be (and feel) seen or heard when you're on the receiving end of that kind of connection.

### **How can you be more present?**

If you're keen to be more present, here's what you can do to get started. Begin by observing your own behaviours for a few days and doing a little self-assessment:

- How and when are you fully present in a conversation, building meaningful connections?
- How and when are you not? What's the impact in each case?
- What do you notice about your behaviours and patterns in the moment?

Then add it up: what behaviours, habits and defaults enable you to be present and connected in the moment and which ones hold you back?

- For example, are you always trying to multi-task, distracting you from being fully present?
- Are your focusing skills weak, making it difficult for you to be present?
- Are you inclined to be a 'fixer', jumping ahead to solve a problem before the person has even finished speaking?

Choose one concrete area to focus on, determine your first step and set a clear intention to practice it consistently. Here are a few examples:

- You may choose to do less of something that distracts you. Always checking emails during conversations? Challenge yourself to break the pattern by turning off your phone and devices to focus.
- Alternately, you may want to do even more of what's already serving you. If you're an active listener, use those skills to best advantage, such as when you notice you've lost the thread in a conversation because your mind is wandering.
- You may also be ready to build a skill that will help you become more present. If staying focused is an issue, mindfulness is a great way to train yourself to return to the present when your mind wanders. You'll find some simple, free tools and apps here: <http://www.freemindfulness.org/download>.

Once you've chosen an area to focus on, challenge yourself to do it for a week (or longer) and see what happens.

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Feature

# Restrictions Cut Both Ways: Be Precise and Reasonable

*The Difficulties of Drafting Enforceable Restrictive Covenants*

Employers often have concerns that departing employees may compete against the employer and/or solicit the employer's customers or employees. One way to mitigate this worry is through contractual protections.

However, such protections pitch the employer's interest in protecting its proprietary interest against the employee's freedom to earn a living. Courts have generally tried to balance the interests of the two parties, and *Hired Resources Ltd. v. Lomond*, 2019 SKQB 195 ("*Hired Resources*"), is a recent decision from Saskatchewan which dealt with such issues. In that case, the court refused to grant an interlocutory injunction restraining a former employee.

Most notably, the decision provides a review of the framework that courts often use to assess the enforceability of restrictive covenants.

## **A Sliding Scale of Scrutiny**

Although non-competition and non-solicitation provisions are often presented together, they are treated differently under the law. Non-solicitation provisions, which prohibit the departing employee from actions such as soliciting business from former clients, are more likely to be enforceable than non-competition clauses, which preclude the departing employee from working for a competing employer. Furthermore, the courts are more accepting of restrictive covenants that constitute part of the agreed-upon terms in the sale of a business than when such covenants are included in an employment relationship, the logic being that there is inequality of bargaining power

in an employment relationship and employees therefore need greater protection.

## **Reasonableness is Key**

In attempting to establish a balance between the parties' interests, the court will look to see if the restrictive covenants are reasonable in the circumstances of the case, which will be unique in each situation. It is up to the party seeking to enforce the restrictive covenant to show the reasonableness of its terms. The court in *Hired Resources* cited *GFL Environmental Inc. v. Burns*, 2017 SKQB 147, which pointed out the following criteria required to establish reasonableness:

- The impugned provision protects the legitimate proprietary interest of the employer;
- The restraint is not too broad in terms of temporal or spatial features; and
- The restraint is not unreasonably restrictive.

However, the reasonableness assessment cannot even begin until the terms of the covenant are clear. In the Supreme Court of Canada decision, *KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6 ("*Shafron*"), the Court confirmed that if the terms of the covenants are ambiguous, it will be unable to demonstrate the reasonableness of the covenant. As a result, an ambiguous restrictive covenant will be *prima facie* unenforceable. Specifically, the court in *Hired Resources* added that ambiguity in what is prohibited as to activity, time or geography, can render the provision unreasonable.

## **Ambiguity is the Enemy**

The court in *Hired Resources* identified several ambiguities in the covenants, and ultimately found the covenants to be unreasonable. In this decision, the employer provided temporary staffing services to its clients, and the employee was an operations manager when he was employed with the employer.

In the non-solicitation provision, the court reviewed the provision that the employee would not "accept the patronage" of "any customer, prospective customer, client or prospective client" of the employer or "any of its affiliates."

The court found that "accept the patronage" would prohibit the employee from providing any services of any kind, and not just the services provided by the employer, to the prohibited persons. The court used the example that if the employee performed as a labourer with any of the prohibited persons, he would have violated the provision even though he was not offering services offered by the employer.

The court also found "prospective customer" and "prospective client" to be overbroad, because even the clients unknown to the employer upon the employee's departure could still be "prospective customers". This essentially changes the non-solicitation provision into a non-competition provision. As discussed above, non-competition provisions are even less likely to be reasonable than non-solicitation provisions.

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# Restrictions Cut Both Ways: Be Precise and Reasonable

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The court further found that prospective clients of “any of its affiliates” to be uncertain. The court referred to similar ambiguities in another recent Saskatchewan decision *Knight Archer Insurance Ltd. v. Dressler*, 2019 SKQB 30, where the restrictive covenants referred to “partner companies”, which was undefined. Without a proper definition, the clients of “partner companies” are not clearly identified. Although the employee may know who some of the employer’s partner companies were in the course of their employment, the court will likely conclude that the employee is not completely aware of the entire scope of the employer’s business and would know all the partner companies, especially when the employer is a large organization.

Another issue with the non-solicitation provision was the lack of geographic certainty. Because the court could not determine with any certainty the geographic areas in which the employer operated its business or the geographic areas in which it wished to restrict the employer’s solicitation, it decided that the provision had to fail. Citing *Shafren*, the court stated

that there is little room for the court to read a geographic restriction into a negative covenant. It also stated that the court cannot rewrite the agreement when nothing demonstrated the parties’ mutual understanding when they entered the contract as to what geographic area the restrictive covenant covered.

Due to the ambiguities above, the court found that the non-solicitation provision was invalid.

### Key Takeaways

The lesson for employers is that while restrictive covenants are often a very useful tool, if employers plan to restrict the employee’s ability to compete against the employer or solicit the employer’s customers or employees, it should be clear in particular on the temporal scope, geographic scope and scope of activities that are prohibited. Every term that can be defined with precision should be defined. Once the ambiguity issues are dealt with, the employer will still need to consider whether the prohibitions are reasonable. The reasonableness of the terms will be dependent on the unique factual circumstances and employers should

consult their legal professional to mitigate the risk of having an unreasonable provision and being left without the desired protection.

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# Harmonious Relationships at Work

*Keep them happy and build the best teams*

The corporate world can be a very scary and competitive place. As managers we need to create harmonious relationships where people are working together towards the realization of each other's goals and the mutual benefits of all. Let's examine the common human factors that affect the way people act, react and make decisions. Understanding these factors can help you to motivate positive behaviour, build confidence in your team and create an atmosphere of harmony.

**People base many of their decisions on emotion, not logic.**

People do have to like you. Be likable. Don't be like the people at Union Station in Toronto. You see the stress on their faces – they have that wrinkle in their forehead, their eye brows are at an angle and they have a frown on their face. Who wants to work for you when you look miserable? Smile and spread joy instead.

They do have to feel that you like them – show you care. Speak to people and listen to what they have to say. Give them your full attention. Don't look at your papers or look away to see what's going on. Look them in the eye and speak from your heart. Listen intently and get to know them. If their child was in a hockey tournament on the weekend, ask them how it went.

Be honest. In the book *'Don't Sweat the Small Stuff'*, Richard Carlson says, "Stop sweeping your frustrations under the rug. Speak what's on your mind, when it's on your mind, in a gentle way." As an HR manager, I noticed that many of the issues in the organization started as a little annoying habit that no one talked about. Dealing with issues openly, quickly and fairly avoids the major problems.

Constantly show appreciation and say thank you. Give certificates of appreciation, employee of the month awards, tickets to movies, vouchers for dinner or even a thank you note.

Discourage gossip. Nothing is worse than hearing someone repeat word for word what you should not have said in the first place. I had the following sign laminated for all of the managers' desks: 'If you wouldn't write it, sign it and hang it on the wall by your desk, don't say it.'

**People use perceptions as facts.**

What people think they hear is what they hear. What you say is not always what they hear. Have you ever had someone repeat word for word what they thought you said? Then you find yourself saying that is not what you meant. It could be the actual words you use and it also could be the tone of voice.

Double check everything. Say it, write it, label it and show them. Use simple words and be specific. People can only meet your expectations when they totally understand what they are. Asking specifically for what you want is better than complaining about what you don't like.

What people perceive to be true is true. Be understanding. If they think there is a problem, there is a problem. If they are upset, acknowledge their right to be upset. Say "I am sorry you are upset." Don't be defensive – find the problem and correct it. Concentrate on the solution, the procedure – without laying blame.

**People are quick to judge.**

Remember the old saying "If Mamma ain't happy, ain't nobody is happy"? Managers are the 'Mammas' of your groups. Live by your example. Be what you want from others. Deepak

Chopra said "If you want joy, give joy to others! If you want love, learn to give love! If you want attention and appreciation, learn to give attention and appreciation! In fact, the easier way to get what you want is to help others get what they want!"

At the end of the day, if you think the world is full of miserable people, look in the mirror. What you send out is what you get back.

**People have preconceived feelings about how to do things.**

Managers have this insatiable need to judge people for their behaviour, to closely examine the things they do for mistakes and then they feel compelled to point out the error of other people's ways. Basically, we just want people to do things the right way – our way. Remember that there is more than one right way to do almost everything. Look at the outcome instead of the process. People can and will be more productive when allowed to do things their way.

**People think that they are unique and want to be treated that way.**

Remember the little things. I kept special notes on my team members: birthdays, names of spouse and children, interests, pet peeves, what they liked and did not like and what their goals were.

**People including you need to have fun.**

Take heed of this quote from Loretta La Roche in her book *'Life is not a Stress Rehearsal'*: "Your inner child is miserable because your outer adult isn't having any fun." Bring fun into your workplace. When people laugh and enjoy each other's company, everyone benefits!

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Feature

## Unconscious Bias

... concluded from page 6

- Change your perception and relationship with out-group members
- Be an active bystander
- Improve processes, policies and procedures

Also, managers can play a crucial role in unearthing these hidden biases by declaring their intentions to be non-biased. They can also provide transparent performance appraisals with emphasis on the employee's exceptional abilities and skills, and grow a stronger mindfulness of their own unconscious principles.

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## Being Present

... concluded from page 11

The most effective leaders and communicators are known for their ability to connect deeply and powerfully with those they lead. They do it by being present. By taking the time to assess your ability to be present and practicing some simple techniques, you too can train yourself to be present and do it well. As you do, you'll be enhancing the quality and effectiveness of your leadership as well as your interpersonal communications.

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## Release or No Release?

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release dissuades voluntary settlement between the parties, noting that this policy argument is best left for Parliament which is free to change the legislation. Lastly, the Federal Court of Appeal determined that any certainty is not a sufficient reason to overturn earlier decisions and dismissed the appeal.

All this said, what does it mean for employers? Employers should carefully consider the provisions of the applicable employment standards legislation as well as the time period for filing complaints pursuant to those statutory regimes when determining whether or not to make settlement agreements and releases for claims.

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## Tort of Harassment

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Employers conducting investigations, which they are authorized to conduct, and having satisfied themselves that it is appropriate to do so in the circumstances, would not be exposing themselves to litigation under the tort of IIMS unless their conduct contained the required causal and intentional elements.

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## Harmonious Relationships

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Morale rises, absenteeism decreases, overall health improves and productivity and creativity go up. Plan some fun. Share your funny stories. Laugh often!

These are just a starting point. One of the best ways to create harmony and excellent teamwork is to hold workshops and events to allow people to get to know each other. When they learn how to understand each other and how to show respect for each other, they will care about each other. When that happens, you will have an effective and productive team.

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