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FALL 2021 VOLUME 19, NO. 4

Nathaly Pinchuk
RPR, CMP
Executive Director

Perspective

Honing Your Interviewing Skills

Go back to the basics

You've got ten positions to fill and no time to do it. You are tired, overworked and feel underappreciated. You run from one interview to the next without a break and all you have time to do is scan the job description and the candidate's resume and you're on again. It's a wonder you remember to breathe.

What kind of hiring decisions are you making under this kind of pressure? Can you do better? Do you want to do better? Naturally you do. You may not be able to slow down the frenetic staffing process, but you do control one aspect — the interview and how you carry that out. Take a few minutes and review some tips from interviewing experts.

What does it take to be a good interviewer? The basics are always the same: preparation, good listening skills and consistency.

Preparation is the Key

Some believe that preparing for the interview is just as important as the interview itself, and not just for the candidate. Go through the file, review the job description and the key competencies you are looking for. Doublecheck to ensure that the questions you are asking match the job. Use a mix of questions to ensure you can get a full 360-degree view of the candidate including how they react to certain real-life scenarios.

Review every job candidate's information before the interview begins. Get a sense of who they are and their background including their previous work experience. Make note of any details you want clarified before stepping into the interview.

The Art of Listening

Perhaps the most important thing you can do during the interview is to listen. The best way to do that is by active listening. The candidate will reveal a lot of themselves during this process and if you are paying attention, you can gather a lot of information about them and their personality. You can improve your active listening skills by receiving, understanding, evaluating, remembering and responding during the interview.

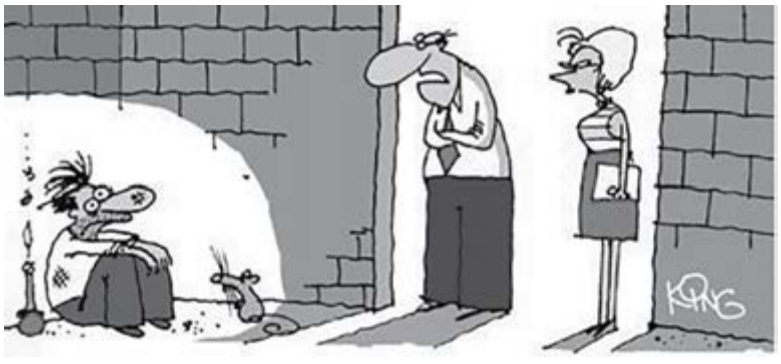
This would include paraphrasing or summarizing an initial response to show you understand and to allow for follow-up information to be provided by the candidate. You could also utilize a combination of open-ended questions and specific probing questions to get them to open up and use short verbal affirmations to encourage them to keep talking. Another important aspect of active listening is to show empathy and maybe even smile from time to time to make them feel comfortable.

Keep it Simple and Consistent

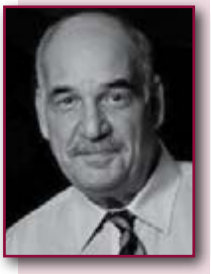
Consistency is the final leg of interviewing basics. Make sure you ask all the candidates the same core questions so you can score and compare later. Implement a standard rating system so that all candidates are judged by the same criteria. This not only ensures an elimination of bias or favouritism, but it also gives you a means to objectively judge each candidate using the same criteria. Whatever you do, don't make it up as you go along. That's a recipe for serious disaster.

Instead, design and implement a simple interview system with good quality questions that help you first qualify and then grade candidates. Stick with the plan you set out from the beginning until the last interview is completed. Keep in mind that candidates are assessing you as much as you are assessing them. Treat them with respect, pay attention to what they have to say and answer their questions honestly. Just as you are choosing a person to come join your organization, they have to choose you too. Good luck with your interviewing and remember to breathe.

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



"Maybe he'll think twice before taking a two hour lunch again."



Brian W. Pascal
RPR, CMP, RPT
President

President's Message

Motivating a Split Workforce

The times are changing

There's a new challenge for managers when it comes to motivating their work teams. Did you really need another one? Well, it's here and likely to stay. How do we manage a split workforce with some in traditional offices, some working remotely and others who go back and forth between these options?

We all have our special ways to get the best out of our employees. While some experts may not approve, many of us like some stick to go along with a lot of carrot. That doesn't mean that bullying or meanness are ever appropriate, but there should be some known consequences for not following the rules or procedures. On the carrot side, there is a lot we can do to push people positively. This includes giving regular feedback and recognition when a job is done well.

Giving recognition is a bit more difficult when people are working remotely, but a positive email or verbal acknowledgement in an online meeting can still go a long way in keeping your staff engaged and productive. You could also give gift cards or rewards when a team or an individual goes beyond the usual service standards. Everyone loves gift cards that can be handed out or sent electronically.

There's also some new research on positive and negative motivators that can improve or decrease workplace performance. *The Harvard Business Review* identified three negative motivators that often lead to reduced work performance: emotional pressure, economic pressure and inertia. The coronavirus and subsequent pandemic likely made those even worse as some people struggled with all three of them. Even those who were able to continue working felt these drag them down as well.

On the positive side, the researchers found that purpose, play and potential were things that helped people cope at work while the world was going crazy outside their office or kitchen window. For those in a traditional workplace, they found that most benefited from a sense of camaraderie and problem solving together which combined all three of these aspects. Those working from home had more difficulty having fun and continuing to grow and achieve their potential while working alone.

Given that information, how do we motivate employees in this split workforce? We must adapt our methods to suit their environment and not expect that things will be the same as they once were. Like most workplace situations, communication will be key. Talk to your employees in person or on Zoom and try to encourage them. Most of all, keep them connected to you and your organization. We do have the technology to make this happen. While the output is up to your employees, the motivation is up to you.

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

INSIDE THIS ISSUE

COVID-19: 18 Months On

Court decisions provide taste of what is yet to come

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Feature

"Unprecedented" is the word most frequently used to describe the COVID-19 pandemic. Indeed, in the workplace came an unprecedented shift — choices made by thousands of employers on a scale never before seen.

What also remains without precedent is how the law will respond in turn. More than 18 months into the pandemic, we continue to wait for many of these issues to work their way through the courts so that we have some guidance as to its impact on the law.

While much remains unknown, a few decisions have been rendered that give us a small taste of what is yet to come. We highlight three of them below.

Mandatory COVID-19 testing found reasonable

In December 2020, an arbitration award upheld an employer's right to require employees to take a COVID-19 test.

CLAC Local 303 filed a grievance on behalf of members at Caressant Care Nursing and Retirement Home ("Caressant") in Woodstock, Ontario. Their position was that Caressant's bi-weekly COVID-19 testing of all staff was unreasonable. Its policy also stipulated that medical accommodation would be addressed on a case-by-case basis, and that any refusal to participate in testing would result in the employee being held out of service until testing was undertaken.

Caressant's testing policy was rolled out during the month of June 2020. All staff were provided with a comprehensive memo on the new policy and a copy of the policy itself. The union's position was that testing would only be a reasonable invasion of staff privacy if they were symptomatic.

Arbitrator Randall weighed the privacy intrusion of members against the safety benefits and goals of the policy. He found that the policy was reasonable, particularly given the risks of COVID-19 among the elderly population.

Takeaway for Employers

While this decision does not speak to mandatory testing in settings outside of long-term care, it does support the principle that mandatory testing may be considered reasonable when employers are able to accommodate as required, and sufficiently mitigate invasion of privacy, particularly in high-risk settings.

Notice periods in a pandemic/CERB

One argument advanced by employees throughout the pandemic has been that the uncertainty created by COVID-19 should lengthen the reasonable notice period.

In February 2021, *Iriotakis v Peninsula Employment Services Limited*, 2021 ONSC 998 ("Iriotakis") held that, in some cases, the pandemic may well "tilt" the notice period away from what otherwise might have been a shorter one. In this case, the motion judge noted that the pandemic likely had an impact on Mr. Iriotakis' job search, particularly given that his employment was terminated in March 2020 at the start of the pandemic. Mr. Iriotakis, who had been employed for just over two years, was awarded a three-month notice period.

Takeaway for Employers

While not ideal, employers should know that *Iriotakis* does not stand for the principle that the termination of employment during the COVID-19 pandemic automatically warrants a longer notice period. In fact, the judge noted that the uncertainty in the job market was a factor to balance with the other factors, but not one to be applied to the exclusion of the other factors. For example, we have already seen certain industries with particularly high demand throughout the pandemic such that it could be argued that an employee can mitigate very quickly.

We note that *Iriotakis* also briefly addressed the issue of whether CERB should be deducted from damages. Here, the motion judge opted not to order such a deduction. However, he noted that such a determination is fact-specific, and appears to suggest that the deduction might be possible if an employer can establish that it would be fair and equitable to do so. Additionally, the decision is entirely silent on two key arguments that employers can put forward on this issue: the fact that the termination of employment led to the eligibility for CERB; and, that thousands of employees that would have applied for EI benefits in the normal course, which would be deductible, were automatically diverted to CERB during the pandemic. In short, *Iriotakis* speaks to CERB on a very narrow basis.

Infectious Disease Emergency Leave and constructive dismissal

In March 2020, the *Ontario Employment Standards Act*, 2000 (the "*ESA*") was amended to include an infectious disease emergency leave ("IDEL") for employees exposed to COVID-19. On May 29, 2020, the Ontario government extended the application of IDEL to apply to all employees laid off due to COVID-19. These amendments relieve against the

continued on page 15...

Howard Levitt
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Ask the Expert

Human Rights Accommodations During Recruitment

How far is too far?

I once had a human rights case for a major Canadian national employer. It had hired a quadriplegic for a CSR position based upon a telephone interview without knowing anything whatsoever about the candidate's condition. Once hired, she immediately advised of her condition and further advised that she required a full-time employee at my client's expense to take her to and from both Wheel-Trans and the washroom as required during the day. She also required a special bed and phone set up in the office to perform her work. The client was prepared to accommodate the special apparatus, but not the other employee, certainly not at its expense, to assist her in her junior position. She proceeded to file a complaint to the Canadian Human Rights Commission.

I sensed that my client was the victim of a scam and sought production of previous complaints that she had filed to the federal Commission. I also threatened to bring an application for production of all complaints she had ever filed at the Ontario Human Rights Commission. I was confident that I would find similar complaints and suspected that she had made a personal cottage industry of creating difficulties for employers and then filing Human Rights Complaints. The case did not get as far as my threatened production motion.

We went to initial CHRC mediation, which I insisted be conducted in person and which the Commission accommodated with the appropriate Wheel-Trans service arranged to pick up the Complainant. The Complainant was initially quite resistant to attending and facing her erstwhile employer.

As we waited, ultimately impatiently, for her late arrival, we received a telephone call that she was unable to attend because there had been a fire alarm in her building, the elevators were locked and, of course, she could not use the stairs. I immediately called the building, located the building superintendent and asked if the story was true. It was. But upon further inquiry, I learned that the fire alarm had been triggered immediately outside of her apartment.

Even the Complainant friendly Commission lost patience with her at that point and that was the end of the case.

There is no difference whatsoever between the obligation to accommodate at the recruitment stage and respecting employees who become disabled or otherwise require accommodation **during** employment. The limit of such accommodation in both is undue burden or hardship, a tough test, even more onerous for a large employer which has the resources and potential positions to arrange either an accommodated position or modified work in the existing position. That is how undue burden is evaluated.

Obviously, if an employee is incapable of performing the basic functions of the job that you are recruiting for, you need not hire them, whether that inability results from a physical disability or a fundamental lack of competence or qualifications. However, if the employee otherwise is the appropriate candidate and mechanisms can be put into place to accommodate their physical disability, you have to provide those accommodations.

In the same way, if the employee is a Seventh-Day Adventist or an Orthodox Jew and the position requires work on a Saturday, you must accommodate their work schedule to permit their absence on Saturday even if that is seen by others, who have to work on Saturdays, to unfairly disadvantage them. The duty to accommodate supersedes collective agreement seniority and shift requirements.

There is one other aspect of preemployment hiring worth noting. If an applicant complains, say 10 months after their rejection, that they were not hired by reason of some prohibited ground pursuant to human rights legislation, you will have to affirmatively establish that that is not the case. This can be difficult if you barely recall that interviewee and do not have detailed records of why he or she was rejected. This can be a real problem if your systems are not properly organized. That is why I always ensure that my clients keep detailed analysis of the criteria that they developed for the positions they are interviewing and then detailed scoring or other data as to why each applicant was selected or not. Interviewing and selecting by score based on relevant job-related criteria not only allows you to defeat a human rights application by a rejected, lower scoring candidate, but permits you to defeat the implicit bias redolent in so many interview processes.

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Employers' Mandatory COVID Testing and Vaccinations

Are they legal? It depends.

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Feature

As the COVID-19 pandemic wages on, new practical and legal issues continue to affect employers and are resulting in new litigation. As courts and tribunals issue new decisions, employers will hopefully receive helpful guidance.

An arbitration decision from Ontario has attracted attention regarding an employer's ability to require employee COVID testing. In that case, the arbitrator upheld the employer's policy requiring all staff at a retirement home to be tested for COVID-19 every two weeks. In essence, the employer took an Ontario government recommendation and turned it into in a mandatory requirement. Employees who refused to test were to be placed on a leave of absence until testing was completed. The mandatory testing was part of the home's overall COVID-19 precautions, which also included masking and requiring employees to change their clothes and shoes at the beginning and end of their shifts. It is also important to note that as of the date of the hearing (September 24 and 30, 2020), no positive cases of COVID-19 had been identified among staff, management or residents of the home.

In the unionized context, a rule unilaterally imposed by an employer will only be upheld if it meets the following criteria:

1. it is consistent with the collective agreement;
2. it is reasonable;
3. it is clear and unequivocal;
4. it was brought to the attention of the affected employees before the employer attempted to act on it;
5. the employees were notified that a breach of the rule could result in discipline; and
6. the employer consistently enforces the rule.

The arbitrator focused on the reasonableness of the policy. The union objected to the required testing on the basis that it breached the employees' dignity and was unjustifiably invasive of privacy. The union specifically pointed to the following in making its arguments:

1. the policy is unnecessary: the alternate recommended mitigation strategies already in place have been successful in preventing an outbreak;
2. the policy is unfair because the residents are not being tested; and
3. the testing doesn't provide anything of value to the employer beyond a "point in time" positive or negative result and does not prevent infection for the employee being tested.

In dismissing the union's objections, the arbitrator found the employer did not have to wait for an outbreak to justify the implementation of its policy. Given the highly infectious nature of COVID-19 and potential deadly consequences for elderly living in contained environments, the intrusiveness of the testing was outweighed by its usefulness. While a negative test may be of limited value to the employee being tested, it is valuable to the employer in terms of risk management. Further, a positive test is of immense value to the employer because it allows for immediate identification, isolation and contact tracing that combats the spread of the virus.

Remembering that the facility in the decision is a retirement home where individuals live independently with minimal to moderate support, this decision suggests that similar policies would also be upheld in long-term care homes where residents require more support. As such, this decision is a welcome one for employers who work with vulnerable populations and arguably for organizations where the unavoidable proximity of employees to one another puts them at greater risk of infection.

An important consideration to any policy is what alternatives are available to reduce risks where employees are not vaccinated. There may be many available alternatives, such as allowing employees to work at home, allowing employees to work with a mask, allowing employees to work under heightened hygiene protocols and physical distancing, and possibly requiring COVID testing of such employees.

We are increasingly being asked about mandatory vaccination policies. As mandatory vaccination is much more invasive, it is decidedly more difficult to implement and more vulnerable to challenge. Legal risks include potential human rights complaints, privacy complaints, constructive dismissal claims and union grievances. While employers also have health and safety responsibilities, these can be addressed without forcing employees to vaccinated. If desired, a vaccination incentive program would

continued next page...

Feature

Employers' Mandatory COVID Testing and Vaccinations

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be easier to defend, less offensive to some employees and potentially just as effective.

It is important to remember that what we perceive as a risk right now may change over time. If sufficient numbers of the population get vaccinated, there may be herd immunity regardless of whether particular employees get vaccinated. There are other serious diseases for which not everyone gets vaccinated. In addition, if most of your employees do get vaccinated, what really is the risk that some do not? In such cases, vaccinated employees will be prepared to accept the risk to themselves and they shouldn't pose a risk to the employees who have not been vaccinated.

What is appropriate for your workplace will depend on its unique circumstances, such as whether employers are union or non-union, essential or not, isolated in their work environments, capable of working from home and physically close to vulnerable people. Employee concerns are also relevant, as is the possibility of accommodating those concerns.

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Reference Checks: The Smarter Approach Part 2

"Just the facts"— Stick only to the facts

Sandra Barker

National Account Executive, Investigative Risk Management

Marty Britton

President, Britton Management Profiles Inc

Feature

We invite you to circle back into the world of reference checks. In the second of this 2-part series, we discuss in further detail the concerns about conducting reference checks as well as turning the tables for when you are on the receiving end of the reference check phone call.

As we discussed in Part 1 of the series, there are some factors to consider if you find yourself in the former employer's position and have been called upon for a reference of a previous employee. Recent case law indicates that you are in fact able to give a negative review. However, the points communicated must be factual and verified prior to sharing. It simply should not just be an opinion that is communicated to a potential employer.

What exactly is the difference between "opinion" and "factual information"? Sharing facts about a previous employee must be verifiable and concrete. For example, you could share that the person in question was written up regarding his attendance 3 times in their last year of employment with your company. You could also share that he had been the subject of 3 separate workplace investigations relating to harassment complaints and had been reprimanded as a result. What you should avoid communicating is "Joe doesn't get along well with others and never showed up to work". As you can see, there is a legitimate difference between the two statements. One, you are sharing facts that have data and if required, can be proven. The second is merely your opinion, very vague and possibly even misleading. Before revealing any information of this type regarding a previous employee however, you will want to ensure that you confirm your facts. This could mean telling the person requesting the information that you will need to review the employee file and get back to them later. Do not just attempt to remember and provide information that may not be 100% accurate. If by chance the employee was terminated for just cause, you could share that information. However, you would be ill-advised to the share details regarding the termination.

A further step that some potential employers take is to request a consumer report for an individual. As mentioned in Part I, the *Consumer Reporting Act* governs what an employer can access. This act outlines what is accessible to potential employers through a consumer report. Items such as credit reports, criminal records and bankruptcy records are included in this act and although they are available, there are guidelines by which who can access them and for what purpose.

First and foremost, a potential employee must provide consent to the consumer report being produced and shared. Each of us has several rights as well those that are outlined in the *Consumer Reporting Act*, some of which are that credit reporting agencies collect, maintain and report your credit and personal information in a responsible manner; your right to know what is being reported about you and to whom; and your right to correct information about yourself that is inaccurate.

For the purposes of employment, it needs to be understood that a potential employer needs to have good reason to request such a report. For example, if the position requires the employee to have access and control of large sums of money, then it would be prudent to know the history and status of the potential employee. If the position does not involve access or risk, then there is really no good reason to request such a report and by doing so, the employer could potentially be limiting themselves in the labour pool. For most positions, a regular background/reference check (including a possible social media search) should supply adequate information on the potential candidate.

It is also important to acknowledge that consumer reports are not always 100% accurate. There is a reason that they include the "right to correct information" in the *Act*.

As you can see, the background check or data verification topic can be very complex. Deciding what to search, when to search and why is dependent on many factors. Choosing to outsource this process to a professional may be a prudent decision that will protect employers in the end.

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Foreign Workers Hired in Canada on the Increase

Getting through the process

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Feature

The importance of foreign workers to the Canadian economy as well as their prevalence in the labour market have been growing rapidly in recent years. In 2017, 2018 and 2019, the number of work permits activated were respectively 340,000, 390,000 and 470,000, indicating a steady increase in new foreign workers in Canada. Despite the important contributions they make to the Canadian workplace, the process through which foreign nationals are retained in Canada can often be problematic, as they can impose onerous obligations on Canadian employers looking to do so.

The principal impediments typically associated with the hiring of a foreign national pertain to the need for the employer to first prove that attempts were made to recruit a Canadian for the job. This is accomplished through an application called a Labour Market Impact Assessment (LMIA) which usually requires that advertisements for the position be posted in multiple sources, for a certain period of time and contain specific information.

It should be noted here that in certain exceptional situations, the LMIA can be facilitated or even bypassed completely in some cases. These cases typically relate to the type of employment in which the foreign worker will be engaged, the nationality of the foreign worker and any applicable treaties between that country and Canada, or the area of Canada in which the foreign national will be working. Each case is different and certain programs are only available for brief periods and/or fill up quickly, so being informed of such exceptions and the eligibility criteria is important to utilize any facilitated options that might be available.

In the majority of cases however, an LMIA must be approved prior to the submission of a work permit and it is here that difficulties may arise and obstacles are often encountered.

Firstly, depending on the job and the specific skill set needed, it is entirely possible that there may be many Canadian applicants vying for the position in question. The LMIA is a measure of protection put in place to prevent foreign nationals from infringing on jobs that could be filled by Canadians. Therefore, if a Canadian employer is looking to hire a foreign national for a job that could be performed by a Canadian, the LMIA is not likely to be successful. Lower skilled jobs which do not require higher education, extensive training or lengthy experience are typically the ones for which LMIA applications are refused.

The recruitment efforts that must be demonstrated are another requirement that could derail the process if done incorrectly by the employer. The advertisements must be posted in sources deemed appropriate by Service Canada, the governmental organization to which the LMIA must be submitted. Quite often, there are location-specific and occupation-specific sources that must be used, yet there is no definitive list of acceptable sources provided by the government of Canada. In addition to this, the length of time for which a given advertisement must run is not consistent across sources. Some advertisements must be active for only 28 days, while for other government-related sources, the advertisement must run continuously until the LMIA is approved.

The content and wording of the advertisements are also the subject of intense scrutiny on the part of Service Canada in the assessment of these applications. The existence of objective standards in this regard serves to prevent abuse by prohibiting the Canadian employer from tailoring the advertisement specifically for the foreign national they hope to retain. If the advertisement laid out very specific requirements, to such degree that it would be difficult for a Canadian, or anyone other than the foreign national for that matter, to qualify, this would defeat the purpose of the LMIA.

Therefore, it is not sufficient to merely post the required number of advertisements for the required amount of time, rather the advertisements must adhere to certain requirements and meet certain criteria. These vary widely depending on factors such as the nature of the occupation and the area of Canada in which the job is located. If the Canadian employer does not satisfy these conditions, then the LMIA will be refused. Omitting certain qualifications or credentials that should be required for a position or including extraneous and unnecessary requirements that unfairly narrow the field of eligible applicants are both errors committed by Canadian employers that usually result in a refusal.

In addition to the numerous pitfalls and potential roadblocks that could rear their heads

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Double Dipping During COVID-19?

Court rules that CERB not deducted from wrongful dismissal damages

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Feature

COVID-19 has taken a toll on all aspects of our lives, particularly employment. More than a year and a half into the global pandemic, we are starting to see the first cases involving aspects of the pandemic make their way through the court system. In *Iriotakis v Peninsula Employment Services Limited*, 2021 ONSC 998, the Court dealt with the impact of the Canada Emergency Response Benefit ("CERB") on damages in the context of wrongful dismissal case.

The plaintiff in this case brought an action for damages for wrongful dismissal after his employment was terminated without cause. The plaintiff subsequently filed a motion for summary judgment and both parties agreed that summary judgment was appropriate. The plaintiff argued that he was entitled to common law reasonable notice and that he did not receive such notice upon termination of his employment. The plaintiff was fifty-eight (58) years old at the time, had just over two years of service and held the position of Business Development Manager.

> We are starting to see the first cases involving aspects of the pandemic make their way through the court system.

There was no dispute as to whether employment was terminated for cause or whether the plaintiff mitigated his losses. The Court determined that there were only three issues to be decided:

1) what amount of notice is the plaintiff entitled to?;
2) what, if any commission is owed to the plaintiff?; and
3) what, if any other payments are owed to the plaintiff?

When determining the amount of notice the plaintiff was entitled to, the Court considered his age as well as the prospects of secure employment and the impact of COVID-19 on the job market. The Court found that although the pandemic had some influence on the plaintiff's job search, how much of an impact was speculative and uncertain. Following the termination of his employment which was at the beginning of the pandemic in March 2020, the plaintiff received CERB. The defendant employer argued that CERB payments received by the plaintiff during the reasonable notice period should be taken into account. The Court found that because CERB was an ad hoc program that neither employer or employee paid into, the plaintiff wasn't earning any entitlement over above that of a taxpayer, and the comparison between the plaintiff's base salary and commission, which was much higher than the amount paid under CERB, it was not equitable in the circumstances to reduce the plaintiff's entitlement to damages by the amount of CERB received by the plaintiff. Ultimately, the Court concluded that the plaintiff was entitled to three (3) months reasonable notice.

The Court went on to consider what if any payment of commission the plaintiff was entitled to receive. Commissions in this case were calculated and paid nine (9) months after the acquisition of the client's business and depended upon the payment and cancellation history of the client to whom the sale was made. The provisions in the employment contract regarding commissions required active employment in order to qualify for commission and stated that any commission payment would cease immediately upon termination of employment and excluded any entitlement to accruing commission during any period of common law reasonable notice following termination of employment.

The plaintiff argued that despite having been aware of the limitations regarding commission payments upon the termination of employment, the provisions were unenforceable because they precluded payment of commissions on sales made prior to the termination of employment that were payable afterwards, contrary to section 1(1), 11(1), and 5(1) of the *Ontario Employment Standards Act,* 2000, SO 2000, c 41 ("*ESA*") which requires payment of all earned wages and prohibits contracting out of minimum standards under the legislation.

The Court noted that there were three (3) types of commissions at issue in this case:

1) commissions arising on sales made prior to termination which would have become payable during the notice period but for the termination of employment;

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Double Dipping

... concluded from page 10

2) commissions arising from sales made prior to termination that would have become payable beyond the notice period but for the termination of employment; and
3) commissions earned and payable on sales made during the notice period but for the termination of employment.

The Court found that given the circumstances of this case, only damages for the first type of commissions could be awarded. Having found that the plaintiff was entitled to common law reasonable notice of three (3) months, he was entitled to receive commissions on sales made by him between six (6) and nine (9) months prior to the termination of his employment as they would have been earned and payable, subject only to the passage of time and the actual payment history of the client during the notice period. The Court affirmed that the employee must be put in the same position he would have been in had he been provided with the appropriate working notice. The Court ruled that the plaintiff was not entitled to damages in relation to the two (2) other types of commissions because they did not fall within the definition of "wages" having been "earned" pursuant to ss.1(1) and 11(1) of the *ESA*. The Court also awarded damages to compensate for loss of the plaintiff's cell phone plan, RRSP and profit-sharing contributions and health spending allowance.

This decision is one of many to come dealing with the impact of the pandemic not only on the job market, but also how damages may or may not be affected by COVID-19 benefits.

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Feature

Working Remotely

Is it the "new" accommodation ?

Over the last eighteen months, working remotely became the new norm for many employees out of necessity. While vaccination rollouts foreshadow a potential return to the workplace for many, has the relative success of working remotely impacted the reasonableness of working from home as a means of accommodation? As recently as ten years ago, this idea would not have been widely considered, if at all. However, with many employers able to operate their organizations effectively through the pandemic with remote workers, this is an accommodation which may be requested by employees with more regularity and therefore must be considered by employers.

A recent decision by the Alberta Human Rights Commission (AHRC) addressed working remotely as a reasonable means of accommodation. As with any workplace accommodation, the onus is first on the employee to request accommodation and substantiate that request with adequate medical information providing that the employee suffers from a disability as contemplated by the *Alberta Human Rights Act*, and has restrictions/limitations as a result. From this point, there is an obligation on the employer to engage in the accommodation process by reasonably modifying the employee's job to accommodate their individual needs to the point of undue hardship.

In *Chiarelli v Bow Valley College*, the AHRC considered whether the employer-College discriminated against the complainant-employee by refusing to allow her to perform a portion of her duties (administrative in nature) at home. The complainant suffered from a medical condition which affected her eyes, causing pain when reading, writing or using a computer for extended periods. She required frequent breaks, use of a laptop (versus a desktop), the ability to pace her work and specifically to work remotely. The complainant's request to work remotely was denied by the employer, who took the position that the complainant would be able to work on campus while meeting the other recommended accommodations.

As a result, the complainant felt she had to resign due to the fact that her working conditions had become intolerable. She filed a complaint with the AHRC, which was investigated and dismissed. On review of the initial dismissal, the sole issue for determination was whether requiring the complainant to work on campus as opposed to her home was reasonable and justifiable.

The AHRC considered that in the past, the complainant and other employees had performed administrative tasks from their home "outside of a duty to accommodate scenario" and that the respondent's proposed accommodation may not fully address the complainant's medical needs.

Despite the AHRC's initial findings that the respondent had provided reasonable accommodation and that the complainant had refused the same, the AHRC found a reasonable basis in the evidence to proceed to a hearing on the issue of whether the respondent's rule that the complainant physically attend at the workplace to perform these duties was reasonable.

While *Chiarelli* is only an interim decision, we believe the hearing stage will provide helpful commentary with respect to how this issue will be treated moving forward. While the complainant in this instance was only requesting to work from home with respect to a portion of her job duties, there is no reason to believe that an employee seeking full-time/permanent accommodation could not avail themselves of the same arguments. With the proliferation of technology making remote work not only possible in situations where it was not previously, many employers over the last year have not seen a reduction in efficiency (or have seen an increase) compared to having employees in the workplace. While working remotely is not necessarily a 'new' development, during the COVID-19 pandemic many workplaces utilized remote work for the first time on a wide scale and were relatively successful in doing so. This type of success likely becomes very persuasive evidence when a decision-maker is deciding whether a request to work from home is a viable means of accommodation.

While working remotely will obviously be more applicable to certain types of employers and work than others, and would still require an otherwise medically necessary accommodation request from an employee, this case serves as an important reminder to employers. Keep in mind when considering all of the information available in the accommodation process, that this may now extend beyond the traditional workplace and into the remote.

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Building Rapport in the Workplace

Make a great first impression and keep it

We all have experienced it: we meet someone and feel an instant rapport, and at the second or third meeting, we feel let down. Something in those later meetings did not fulfill the promise from that first meeting where you formed your first impression. The rapport was not the same and this affects the relationship.

To me, rapport is about connection.

We connect with people on all levels, even if we are unaware of these invisible ties to each other. We have connections with people whether they are standing next to us or are on the other side of the world. For example, have you ever thought about someone and picked up the phone to call, only find them already connected to you even though your phone never rang?

It is these connections that feed rapport. They start forming at that first meeting when impressions are forged. So, rapport is based on continual connections that reaffirm a first impression. They are interconnected and they overlap.

The quality of the connection starts when people form an impression of someone they have just met. A study by Harvard University psychologists found that the opinions students formed toward new teachers in only two seconds were mostly unchanged as they held after sitting through the whole course. Making a good first impression is an important step toward building rapport.

None of this means you are likely to become everyone's best friend in a few seconds. Still, if you make the right first impression, one based upon showing your genuine, authentic self and your values, you can initiate the building of a lasting rapport within 90 seconds.

Making a good first impression is influenced by your attitude because your attitude sets the quality and mood of your thoughts. Your moods and thoughts influence the tone of your voice, the words you use, your facial expressions and your body language.

In many ways, your attitude sets the quality of your relationships.

When you cast a "beneficial attitude," one that is optimistic, interested and cooperative, other people will want to be around you. When you project the opposite position, you will have a reverse reaction.

You choose your attitude, which means you are at least 50 percent in charge of building rapport with each person you meet.

Start building rapport right away.

1. Make sure your words, tone of voice and gestures are all consistent.

When faced with contradiction amongst the tone of your voice, the words you use, your facial expression and your body language, people pay the most attention to body language. They are next influenced by the tone of voice — and surprisingly little to the actual words being said.

2. We like people who are like us. Show strangers your similarities.

Deliberately control your behaviour to meet them on common ground in terms of how you speak and relate, at least for a short time. Look around a restaurant, especially on Valentine's Day or any other public place where people meet and socialize and compare those couples who are in rapport with those who are not.

The ones who are in rapport lean toward one another, adopt similar arm and leg positions, talk in the same tones of voice. In short, they seem to be synchronized.

The quickest way to establish rapport with people you meet is to synchronize with them. Synchronizing does not mean you are phony or insincere. Its purpose is to help you put the other person at ease and speed up the rapport that would otherwise take longer to develop.

Don't make your movements, tone and voice mimic the other person's, but act with them the same way you would if you were already friends.

3. Make a positive first impression.

Five stages of a strong first impression:

- Use open body language. Open hand gestures and face the other person.
- Be first with eye contact. Look the other person straight in the eye.
- Beam a smile.
- Be the first to identify yourself with a pleasant, "Hi! I'm Monika!"
- Lean subtly toward the other person to show your interest and openness, and begin to show how you are similar.

4. Tune in to the person you are meeting.

Pick up on the other person's feelings and identify with them by synchronizing your breathing patterns.

Use your voice to reflect the mood conveyed by your facial expressions. Please do not copy

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Feature

Building Rapport in the Workplace

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them clumsily, but notice their posture, gestures, head and body movements and facial expressions and use your body language to show that you accept them.

Encourage the other person to start talking so you can find out what matters to them. Do these things also matter to you? Do their interests somehow feed into yours? Tell them. Ask them questions that cannot be answered with a simple "yes" or "no" but instead prompts open dialogue to reveal themselves.

5. Maintain the rapport

Rapport is the condition of being in sync, in tune, on the same wavelength. If you fall out of synch, discord happens and rapport will erode over time.

Why do we all need to focus on rapport?

I have heard it said that with enough rapport, anything is possible. Without rapport, almost nothing is possible.

In business, rapport is critical to coordinating action and exchanging information. It is at the foundation of all our relationships.

When rapport is in place, it helps to maintain an open channel of communication with another person. It enables you to meet them where they are. You do not need to agree with them, but rather be open and willing to accept their point of view. Let them know you are there with them.

Ironically, most business decisions are based on rapport, not on technical merit or the best idea. It makes or breaks most aspects of getting what you want.

The purpose of building rapport (i.e., matching and aligning with the other person) with someone is to get fully in step with them so that the next step you take is more likely to be followed.

When you start by matching and meeting them (not expecting them to come to you), you can take immediate control of the situation and move with greater confidence that they will stay with you. Worst case, matching gives you something to do when you get bored during staff meetings.

Try it out — it's fun and rewarding.

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COVID-19: 18 Months On

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layoff provisions under the *ESA* such that employees are deemed to be on the IDEL rather than laid off, and without recourse to a constructive dismissal argument under the *ESA*.

The question for many employers has since been what, if any, impact do these regulations have on a laid off employee's ability to claim constructive dismissal at common law? In April 2021, the Ontario Superior Court of Justice addressed this issue in *Coutinho v Ocular Health Centre Ltd.*, 2021 ONSC 2076.

In short, Ms. Coutinho was temporarily laid off from her position on May 29, 2020 and commenced a constructive dismissal action against her employer three days later. Ocular Health argued that there was no constructive dismissal pursuant to the IDEL, and thus, no cause of action.

Justice Broad found that the IDEL did not restrict Ms. Coutinho's common law right to treat the temporary layoff as a constructive dismissal. In his reasons, Justice Broad relied on section 8(1) of the *ESA*, which provides that no civil remedy of an employee is affected by the *ESA*. As the Ontario government did not explicitly address common law rights, they were preserved.

Takeaways for Employers

While this decision is disappointing given the vast number of temporary layoffs that were triggered by the pandemic, there is hope. Ocular Health was argued on narrow grounds and should therefore not be considered as a wide-sweeping authority on this issue. Other defences such as condonation, past practice and the doctrine of frustration remain available and have not yet been tested before the courts in the context of COVID-19. More remains to be seen on this very important issue.

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Foreign Workers

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during the application, the process itself is also often problematic in terms of the ability of the employer to bring in the foreign worker needed. This is due mostly to the lengthy delays associated with procuring both the LMIA and the work permit. The processing time for an LMIA can vary widely but is usually somewhere between 3 to 6 months. As previously stated, this must be approved prior even to the submission of the work permit application. Once approved and the work permit application is submitted, there are country-specific processing times that apply and determine how long it will take for work permit approval. For example, from India, a country from which Canada imports a large proportion of its foreign workers, the current processing time is listed at approximately 11 weeks. All this to say that retaining a foreign national is not a very expeditious process, which could hinder a Canadian employer's ability to effectively meet their labour needs.

Logistical hurdles, the subjective assessment of the immigration officer and the protections afforded to the Canadian citizen labour market are all factors that contribute to the difficulty often encountered by Canadian employers looking to retain foreign nationals. In many cases, the success of a given business venture is inextricably linked to an employer's ability to retain the workers needed. If the ability to do so is thwarted as a result of the numerous obstacles laid out above, this can be damaging to the Canadian company in question and can be challenging to the Canadian economy as a whole.

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