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WINTER 2026, VOLUME 24, NO. 1

Sharlene Rollins
RPR
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Perspective

Employee Surveys

Great tools if you are prepared to listen

I must admit that I'm not the biggest fan of employee surveys. They can be overused, misused and more often than not, ignored. But when done right, with proper preparation and good follow-up, they can be another valuable tool in your management arsenal.

First, if you are not really interested in finding out what your employees think, why bother surveying them? If you already have a good sense of where your employees are and if they are energetic, engaged and motivated, maybe you don't need to take their pulse through an employee survey. On the other hand, if you really want to know what your workforce thinks about what's going on inside the organization or get their views on a new plan or project, it might make sense to survey them. If done well, you will get greater insight on their views and attitudes that can identify problems and lead to solutions or even better, head off potential problems.

You should NOT ask unless you are prepared to listen and then act. Here are a few ideas to consider.

When was the last time you conducted an employee survey? If it wasn't too long ago, maybe in the last two years, you can use the information gathered at that time as a benchmark to see whether things are improving or not. Many organizations set up a team to design the survey and let them develop the survey questions together. One basic rule that you should consider is to keep the survey as short and as simple as possible. A good employee survey should take no more than 20 to 30 minutes to complete. Getting buy-in from employees before the survey goes out is crucial. There should be employee representation on the design team. Employees should get advance notice that the survey is coming and what you are hoping to learn from it. In order to get the best possible information and data, employee surveys should be both anonymous and confidential. There should not be any attempt later to try and figure out 'who said what'. That will hinder participation in any future employee survey.

HR can be given the responsibility to collect the survey data and prepare a preliminary report, but sometimes HR is not seen as completely impartial by employees. That is why many organizations use a third party to collect and analyse the data. This ensures that the information is looked at in a fair and unbiased manner. Management should receive the results first before results are disseminated. This is mostly to protect the anonymity of the process and to weed out any comments that may be made about a particular manager.

Senior managers and HR can then have an open and honest discussion about the findings and plan the next steps. Regardless of the results, the information collected should be shared as much as possible with the employee group. They need to see that their voices were reflected and that they can trust the process. After an initial discussion across the organization about the survey results, a plan can be developed to implement changes as required or requested, within financial and other limitations. There also needs to be a way to track progress on any required changes and updates provided to employees.

Sharlene Rollins is Manager, Administration for IPM [Institute of Professional Management].

"There's a Mr. Tilbin here to see you, Sir. Shall I tell him you're on the phone, in a meeting or out of the office?"

Nathaly Pascal
RPR, CMP, RPT
President

President's Message

Be Your Own Advocate

Practice makes perfect

If you have a problem or an issue at work, it's likely that no one will address it or fix it until you raise it. You'll often have to do this more than once. Advocating for yourself is a skill that takes extensive practice. Many people lack the confidence to raise their concerns at work or they do not do it properly. That's why it's good to start slow with some lower risk situations and then work your way up as you build confidence in your self-advocacy role.

Along with practice, you will also need to brush up on other skills. Not surprisingly, better communication is the primary skill you need to refine. You need the capacity to be able to express your needs and opinions in as simple and straightforward a manner as possible. Long-winded speeches will get you nowhere. One great tool is active listening because you learn to speak and then to listen, both equally vital if you want to make sure that your message gets across.

Assertiveness is another skill you need to master to be a successful advocate for yourself at work. This is difficult because it means that you have to learn, if you haven't already, to set boundaries, say no when it's not right for you, and ask for what you need. Whether it's a raise or new equipment or more time off, you have to make the request in an assertive way without appearing pushy or aggressive. There is zero tolerance for workplace bullies. Find the right formula and use it carefully.

Do your homework before raising an issue or making a request. Is there an existing policy or procedure that you can point to? Do you have any data, research or statistics to back up your claims? You must be ready to provide this if you are challenged. It is also helpful to come with possible solutions and be prepared to negotiate. No one will give you anything you don't deserve or don't really need. Make your best case and if you don't get everything you want right now, you can always come back if the situation changes.

Finally, master the art of compromise. It will save you a lot of trouble as an advocate for your position. It will ultimately demonstrate that you are a reasonable and credible person. Even more importantly, it may open the door to a solution that you didn't even consider when you started this discussion. Stay focused on getting to a win-win scenario and your advocacy will always pay off.

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

INSIDE THIS ISSUE

Tom Ross
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A Principled Approach to Employment Contract Interpretation

Act with good faith when claiming just cause

In the recent Alberta decision, the Court of King's Bench held that failing to successfully establish a just cause defence will not preclude an employer from later relying on an otherwise enforceable without cause termination clause.

Background

The relevant facts of the case were as follows:

- The Plaintiff Employee was initially approached by the Defendant Employer in November 2012 to commence employment.
- Over the next year, the Defendant repeatedly approached the Plaintiff with various offers of employment, but the parties were unable to agree on terms.
- In September 2013, the Plaintiff ultimately accepted an offer of employment made by the Defendant. Following that, the Employer issued the Employee a formal employment contract. Upon reviewing the proposed employment contract, Mr. Singh requested various amendments, which were all subsequently agreed to by the Employer.
- In early 2019, the Employer's new President broached termination with the Employee, and the parties agreed the Employee's last day of employment would be September 30, 2019.
- In December 2019, the Employee initiated litigation against the Employer in respect of his termination of employment. In the Employer's filed defence, it took the position that it had just cause for the Employee's dismissal; however, these allegations were ultimately removed from its defence in July 2020.

Court Decision

Several issues were before the Court, including whether the termination provision in the Employee's employment contract was enforceable, and if so, whether the Employer had repudiated the employment contract by either alleging just cause in bad faith or by failing to provide the Employee his contractual entitlements after termination.

In reviewing the termination provision, the Court concluded that it was sufficiently clear and unambiguous to displace the implied term requiring the Employer to provide reasonable common law notice of dismissal. In doing so, the Court also held that even if there was ambiguity, the principle of *contra proferentem* would not apply as the Employee was a knowledgeable and sophisticated executive who had managed to negotiate various changes to the Employer's proposed terms of employment, including specifically the termination provision itself (and there was no power imbalance or inequality in bargaining power between the parties).

Having rejected the Employee's argument that the termination provision was ambiguous, the Court then assessed whether the Employer had repudiated the employment contract by either alleging just cause in bad faith or failing to pay the Employee his 90-day contractual termination entitlements after his termination. In response, the Court provided a comprehensive overview of the related case law and held as follows:

> [92] An employer's failure to establish just cause will not disentitle the employer from enforcing an otherwise valid without cause termination provision provided the allegations of just cause are made in good faith: *Simpson v Global Warranty*, 2014 ONSC 6916 at para 8.
>
> [93] In my reading of the authorities surveyed in *Humphrey*, provided there is a good faith basis for the employer to allege just cause, both at termination and during litigation, an employer who subsequently decides not to pursue just cause or is unable to prove just cause, is not precluded from relying on a without cause termination provision.

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Feature

Feature cont'd

A Principled Approach to Employment Contract Interpretation

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> [94] The good faith requirement means the allegation of just cause cannot be brought dishonestly or for an improper, dishonest, or fraudulent purpose.

Accordingly, the Court held that although the Employer failed to establish that it had just cause to dismiss the Employee, its just cause allegations and defence had not been advanced improperly or in bad faith. As such, it was not precluded from relying on the enforceable termination provision in the Employee's employment contract to limit his termination entitlements at trial. To this end, the Court capped the Employee's award for pay in lieu of notice at 90 days.

Takeaways

This decision is helpful as affirming the proposition that a failed just cause defence will not automatically prevent an employer from relying on an otherwise valid without cause termination provision.

This decision also serves as a reminder that where individuals actively negotiate the terms of their employment agreement with an employer, particularly where they can be characterized as being "knowledgeable and sophisticated," such activity will likely serve to decrease the likelihood of the principle of *contra proferentem* applying. That concept interprets ambiguities against the interests of the contract drafter. It is often applied to give employees the benefit of the doubt when interpreting any ambiguous provisions.

Finally, this decision reminds employers of the need to act with good faith when claiming just cause for termination.

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LOCATION, LOCATION, LOCATION

How far will employees go to mitigate?

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Feature

Introduction

Employers with multiple locations may sometimes face the difficult task of deciding whether to relocate employees to a different location. Employers should be careful to ensure that relocating employees does not result in a breach of a fundamental term of the employee's employment. Further, when closing one location and offering employees employment at a new location, employers should consider whether it is reasonable for each employee to accept employment at the new location. What is reasonable may vary depending on the circumstances.

The Facts

In *Oostlander v Cervus Equipment Corporation*, 2023 ABCA 13, Mr. Oostlander had worked for Cervus Equipment Corporation ("Cervus") for 36 years as a heavy-duty mechanic, working at Cervus' location in Bassano, Alberta. Cervus made a business decision to centralize its operations in Brooks, Alberta, approximately 50 kilometers away from Bassano. Mr. Oostlander's employment at the Bassano location was ultimately terminated, and Cervus offered him a job in Brooks. Mr. Oostlander rejected the offer and sued Cervus for wrongful dismissal.

After litigation had commenced, Cervus made a second offer regarding the job in Brooks. This time, Cervus offered a one-time payment of $8,000 to address the increase in gas and vehicle wear that would result from Mr. Oostlander commuting from Bassano to Brooks each day. This offer was also rejected by Mr. Oostlander.

The Decision

The question before the Court was whether it was reasonable for Mr. Oostlander to reject Cervus' offer to work at the Brooks location. The parties conceded that the job offered to Mr. Oostlander in Brooks was nearly identical to the job he held in Bassano, with the same compensation, many of the same coworkers and the same reporting structure. However, to work in Brooks, Mr. Oostlander would have been required to commute 100 kilometers per day on the TransCanada highway or relocate to Brooks.

Mr. Oostlander lived approximately four minutes away from Cervus' location in Bassano but would be required to drive nearly two hours per day to the Brooks location. The trial judge concluded that the $8,000 offered by Cervus to address Mr. Oostlander's increased costs related to his commute to Brooks would not cover Mr. Oostlander's actual increased costs. The trial found that it was not reasonable for Mr. Oostlander to commute to Brooks as a means of mitigating his damages.

Similarly, the trial judge found that it was not reasonable for Mr. Oostlander to relocate to Brooks. At the time of termination of Mr. Oostlander's employment, he was 60 years old and had lived in Bassano for more than 30 years. Mr. Oostlander's wife also worked in Bassano and would be faced with the same commuting issue if the couple relocated to Brooks. Given the circumstances, the trial judge found it was reasonable for Mr. Oostlander to refuse to relocate to Brooks.

The Court of Appeal upheld the trial judge's decision that it was reasonable for Mr. Oostlander to reject Cervus' offer of re-employment in Brooks.

Key Takeaways for Employers

Whether seeking to relocate employees, consolidate work locations or monitoring mitigation efforts, it is important for employers to consider the following:

- **The circumstances of each employee:** Mitigation is not one size fits all, and what is reasonable will depend on the specific circumstances of each employee. For example, it may be more unreasonable to ask an employee who commutes to work using public transit to relocate to a rural location than it is to request the same of an employee who drives to work each day. It is important

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LOCATION, LOCATION, LOCATION

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to consider the realities of each employee and consider whether the relocation or mitigation is reasonable.

- **Enforceable termination clauses:** To avoid being at the mercy of an employee's mitigation efforts to reduce reasonable notice damages, employers should consider agreeing to specific termination notice entitlements in the employment agreement rather than leaving it to common law.
- **Constructive dismissal:** When considering whether relocation of an employee is appropriate, consider whether the relocation could constitute a breach of a fundamental term of employment. If relocation is not reasonably contemplated in the employment agreement, a unilateral change to the work location by the employer could result in a claim of constructive dismissal.
- **Legal Advice:** When considering relocating employees, employers should strongly consider discussing with legal counsel to reduce the risks of constructive dismissal or wrongful termination.

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Big Changes in Small Claims Court

Legislative updates: what you need to know

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Feature

The Small Claims Court is a branch of Ontario's Superior Court of Justice that handles civil disputes involving smaller monetary amounts. It offers a faster, more affordable and simplified legal process compared to higher courts.

Common cases include:
Unpaid debts (e.g., invoices, loans, overdue rent), breach of contract, property damage, substandard services or defective goods, and certain employment - related disputes.

New Monetary Limit: What's Changing?

As of October 2025, Ontario increased the Small Claims Court limit from $35,000 to $50,000. This change aligns with national trends. Alberta raised its limit to $50,000 in 2022, and British Columbia currently sits at $35,000.

This new threshold makes it easier and more cost-effective for individuals and small businesses to address disputes without going through the more complex and expensive Superior Court process.

Impact on the Superior Court

The updated limit is expected to shift up to 30% of cases currently heard in the Superior Court down to Small Claims Court, particularly: contract and debt disputes, property damage from accidents or negligence, employment conflicts, such as wrongful dismissal or unpaid wages.

This redistribution aims to ease pressure on the Superior Court, allowing it to focus on more complex and high-value litigation.

Challenges Ahead

Despite the positive intent, Ontario's Small Claims Court is already facing serious delays, with some regions such as Toronto, Peel and Ottawa reporting wait times of up to three years from filing to trial.

To prevent further bottlenecks, this reform must be accompanied by: hiring more judges and court staff, investing in mediation programs, enhancing digital infrastructure and online dispute resolution tools

Why This Matters

If implemented effectively, the $50,000 limit will: expand access to justice, reduce litigation costs, and accelerate dispute resolution for thousands of Ontarians. However, without structural improvements, it could simply shift delays from one level of court to another.

Bonus: Impact on Landlord-Tenant Disputes

The reform will also affect the Landlord and Tenant Board (LTB), which will now be able to handle claims up to $50,000 for unpaid rent and property damage - another move toward a more efficient dispute resolution system.

Stay informed and prepared. This reform marks a significant shift in how civil justice is delivered in Ontario. If you have a legal matter falling within the new limit, Small Claims Court could soon become your go-to option.

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Members Quarterly Staff Writer

Connections Between Employee Disabilities and Mental Health

What employers can actually do to help

The connection between mental health and employee disabilities has never been clearer. According to the Mental Health Commission of Canada (MHCC), over 30 percent of both short and long-term disability claims in Canada can be attributed to mental health problems and illnesses. The cost is staggering. The MHCC estimates that the total cost from mental health problems to the Canadian economy is over $50 billion a year. Every year mental health problems and illnesses among working adults in Canada cost employers over $6 billion in lost productivity from absenteeism, presenteeism and turnover.

In the US, the problem is even worse. A study by Mercer and Global Disability Inclusion revealed that over half of employee disabilities are related to mental health. Employees identified a range of mental health issues that are a prime factor. This included a mental health condition like severe depression or anxiety. The data gathered from more than 5 million employees is just more research that shows how widespread mental health conditions are in the workplace. It is also another signal to employers that much more needs to be done to support their workers in this area.

One particular mental health condition is surging in the workplace, at least among some segments of the working population. Young workers and women are experiencing depression at higher rates than ever. One new study showed that almost 40 percent of depression cases in the past two years were found in young people. For women, it was even worse with 60 percent of cases of depression found in women across all age groups.

So, what can employers do to combat this scourge of mental health problems that is plaguing so many workers? They can do a lot. Everything seems to help a bit and every bit helps. They can let their employees know that they are not alone in their difficulties. Offering things like awareness programs, mental health days and access to counseling services are all welcome additions to combatting mental illness in the workplace. However, we must all realize that much more needs to be done if we are going to reduce the problems caused by mental distress.

Some employers are looking at innovative approaches to help their employees. Employee Assistance Programs are being revamped to allow for support for employees with mental health issues whether they arise at work, at home or from a predisposed condition. EAP programs are also being designed to provide different levels of support depending on what the employee needs at the time.

In the first line of support, there are self-help tools like online training and webinars that employees can use to educate themselves and monitor their progress. The next level of support provides individual counselling or coaching from a professional who has specialized experience in their condition. Finally, there are supports for people who need a clinical approach. There are virtual or in-person mental health therapists who can provide one-on-one support as required.

At the MHCC, there are a variety of supports available to both employees and employers. Their work has included developing the National Standard of Canada for Psychological Health and Safety in the Workplace. This standard has a voluntary set of guidelines, tools and resources to help guide organizations in promoting mental health and preventing psychological harm at work. They also have resources to help organizations create more mentally healthy work environments and a library of case studies with specific organizations who have worked to identify and understand best practices for implementing the standard.

In addition, the MHCC also has a free online toolkit to support organizations working to implement the standard and a set of posters that features the 13 psychosocial factors that are described in the standard. Each of these posters has a customizable space that allows organizations to showcase internal programs and initiatives aligned with these factors. Lastly, they have the Minds Matter tool that was developed by CivicAction in collaboration with a group of employers, experts and individuals with first-hand experience of mental health issues. Over 1500 organizations have taken the assessment and are working to provide support and benefits to well over 3 million workers.

For more information and to access the National Standard of Canada for Psychological Health and Safety in the Workplace and the related assessment tools, you can visit their website at: https://mentalhealthcommission.ca/national-standard/.

Members Quarterly Staff Writer

Feature

Two Rare Employer Wins in Ontario Courts

Enforceable ESA-Only termination clauses and valid layoff provision

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Feature

In employment law, Ontario courts are known to be "employee friendly" given the unequal bargaining power between the parties as the courts are rightfully protective of more vulnerable parties. Accordingly, employers are often fighting intense uphill battles to have their employment contracts, especially ESA-only terminations clauses, upheld as enforceable in Ontario courts. However, two key decisions recently provided rare employer wins that confirm such common law limiting clauses, when done right, will still be found to be enforceable.

Enforceable termination clauses do exist where they can be reasonably interpreted

In *Bertsch v. Datastealth Inc.*, 2025 ONCA 379, the Ontario Court of Appeal confirmed that properly drafted termination clauses can limit employees to only their statutory minimum entitlements under the *Employment Standards Act, 2000* ("ESA") upon termination. The termination clause at issue was as follows:

> Termination of Employment by the Company: If your employment is terminated with or without cause, you will be provided with only the minimum payments and entitlements, if any, owed to you under the *Ontario Employment Standards Act, 2000* and its Regulations, as may be amended from time to time (the "ESA"), including but not limited to outstanding wages, vacation pay, and any minimum entitlement to notice of termination (or termination pay), severance pay (if applicable) and benefit continuation. You understand and agree that, in accordance with the ESA, there are circumstances in which you would have no entitlement to notice of termination, termination pay, severance pay or benefit continuation.
>
> You understand and agree that compliance with the minimum requirements of the ESA satisfies any common law or contractual entitlement you may have to notice of termination of your employment, or pay in lieu thereof. You further understand and agree that this provision shall apply to you throughout your employment with the Company, regardless of its duration or any changes to your position or compensation.

In the lower court, Justice Stevenson found the provision to be clear and unambiguous and consequently struck the employee's claim. The employee appealed to the Court of Appeal, reiterating the clause was ambiguous because an ordinary person not trained in law might believe they could be terminated for cause without notice, for conduct such as negligence, rendering the wording unenforceable.

The Court unanimously dismissed the appeal. In doing so, the Court was clear that the termination provision at issue was clear and unambiguous when *reasonably* interpreted. They confirmed the question was not if an ordinary person may have an incorrect interpretation, but how the agreement could be *reasonably* interpreted. Adopting the employee's proposed interpretation would ignore the words "with or without cause". Rather, when reasonably interpreted, the termination provision did not contravene the ESA's minimum standards. What matters is reason.

Interestingly, this decision also confirmed employers may use Rule 21 of the *Rules of Civil Procedure* as a mechanism to have the court determine the enforceability of a termination provision at the outset of litigation. Further, the Court also reiterated that while ambiguous termination clauses should be interpreted to favour employees, a finding of ambiguity requires **"something more than the mere existence of competing interpretations"**, the principle previously applied in *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571.

Validly drafted temporary layoff provisions are not terminations

Similarly, in *Taylor v. Salytics Inc.,* 2025 ONSC 3461, the Ontario Superior Court affirmed a validly drafted temporary layoff provision is not a termination provision, even if tucked into a termination section of an employment agreement that is itself

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Two Rare Employer Wins in Ontario Courts

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unenforceable. The Court found that the assessment must be of the substance of the provision, and not where it is located in the employment agreement.

In *Taylor*, the employee was temporarily laid off, pursuant to a layoff provision in the employment agreement. While the employee was ultimately recalled and did return to work, the employee nonetheless took the position that his layoff was a constructive dismissal because his employment agreement contained an express layoff provision in the termination section, which was itself not *Waksdale* compliant. The employee argued that accordingly, the entire termination section including the temporary layoff clause, must be struck, leaving the employer without a valid layoff provision to rely on. The employer did not dispute that the for cause termination provision was unenforceable, but argued that the temporary layoff provision was not a termination provision.

The Court agreed with the employer, and specifically confirmed that the placement of the layoff provision under a termination heading cannot be determinative. The Court affirmed the principle noted in *Waksdale*, that the characterization of a provision does not depend on its placement or form, but on its substance. The Court explained the issue is not where in the employment contract the provision is found, but whether it is, in substance, a termination provision. The Court acknowledged a layoff is a termination when there is no clause in the employment agreement permitting the employer to lay off the employee, but when there is such a clause, the layoff is not a constructive dismissal, and therefore not a termination. What matters is substance.

Take Aways for Employers:

Pay attention to reason and substance. When assessing the enforceability of termination clauses, it is not about whether there are possible differing interpretations of the wording but how the agreement could be reasonably interpreted. Similarly, when looking at a layoff provision, if it is validly drafted, it cannot be conflated with termination provisions.

What matters is quality and current drafting by professionals keeping up with the current state of the law. Please make sure you have all your employment agreements reviewed formally on a regular 3-to-5-year basis. Where changes are needed, ensure you are updating them not only for new hires, but also for existing employees as continuing employment agreements, to keep terms of employment clear and enforceable.

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The Power of Words

Action Verbs and the Gift of Imagination

Eleanor Kibrick
MSc

Feature

Your imagination is a powerful tool to shift your energies in the direction of creating what you want rather than what you don't want. When you imagine positive experiences, this 'gift' provides your body and mind with this outcome.

In order to activate your shift, it's very important to use this language of creation, by using **verbs of action.**

A partial list of action verbs include: I am, I can, I will, I choose, I love, I have, I create, I enjoy.

These action verbs propel you forward while you also imagine positive outcomes in your life.

If you use negative verbs that lack the power of creation, you'll stay stuck in old patterns.

Disempowering verbs include: I can't, I won't, I don't, and even I try.

Trying isn't doing – it's just trying to do.

I AM is a very powerful statement for defining ourselves, therefore it's important to watch what comes after this phrase.

If you say things like: "I am sick and tired," you'll be calling up an outcome of being sick and tired. This is fully described in the book "Your Body Believes Every Word You Say," by Barbara Hoberman Levine.

You can say, instead, for example, that "I feel sick and tired." This is a temporary state. It doesn't describe who you really are.

Another common I AM phrase is: "I am sorry." It's better to say, "I apologize" or "I regret."

Once you choose and then imagine something that you aspire to, you can then attract the results you want.

For example, if you are worried about exams that are coming up, you can instead choose - in your imagination - to feel relief and joy about the excellent grades that you've achieved. In your imagination, you can experience 'being in the outcome' - feeling happy that things worked out better than you could have hoped for.

Dutch resistance fighter Corrie Ten Boon was an example of overcoming worry. During WWII, she worked with the Dutch resistance movement and saved many Jews. She was captured and then deported to a concentration camp, living there through to the war's end. She was a very strong manager of her belief systems and was quoted as saying, "Worry does not empty tomorrow of its sorrows. It empties today of its strength." She helped many prisoners stay strong and endure. She survived the camps and died many years later.

In his book *The Power of Awareness*, the writer, speaker and mystic Neville Goddard wrote, "Imagination is the very gateway of reality…By imagination we have the power to be anything we desire to be."

In *The Power of Your Subconscious Mind*, Joseph Murphy shares how to make our imagination even more powerful, "Make the picture vivid and real. Hear the voices, see the gestures and feel the reality of it all. Continue to do this frequently, and through frequent occupancy of your mind, you will experience the joy of the answered prayer."

In *As You Think: Becoming the Master of Your Own Destiny*, James Allen reminds us, "We imagine that our thought can be kept secret, but it cannot – it rapidly crystallized into habit, and habit solidifies into circumstance…Thought allied fearlessly to purpose becomes creative force."

We are powerful creators when we make conscious choices. Let us activate our imagination to experience our desired outcomes right now. With your positive imagination, you'll then attract positive results.

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Termination Clauses

Drafted right, but ruined by repudiation

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Feature

In the ever-evolving legal landscape regarding the enforceability of severance-limiting termination provisions, it is already difficult enough trying to get the legal drafting right. When it comes to proper drafting, courts continue to heavily scrutinize every aspect of an employee's termination clause. Due to such scrutiny, regularly reviewing the language utilized in your standard employment contracts is very important. However, even when employers take every possible precaution to ensure their template termination provisions are properly drafted, we are now seeing courts focus in on an additional consideration that some employers are failing to make - namely, being mindful of their conduct when terminating an employee.

The trend we are seeing in recent case law is that judges appear to be more willing to rule that an employer's pre - or post - termination conduct amounted to a repudiation of the employment contract. Repudiation in this context arises where the employer is substantially failing to meet their obligations under contract (which includes an implied duty of good faith), giving the employee the ability to terminate the contract. Further, when a court finds that the employer repudiated the contract, it can legally preclude the employer from relying on a severance-limiting termination clause contained within the contract. This means that even a properly drafted termination provision may be rendered unenforceable if a court finds that the employer's actions amounted to a repudiation of the employment agreement.

It has been held by the courts that the test for repudiation of an employment agreement requires looking at whether the conduct of the employer shows "clear intentions to no longer be bound by the terms of the employment agreement." Some recent examples of employer-conduct that have been found to amount to repudiation include:

- An employer subjected an employee to a toxic work environment, set the employee up to fail, and embarrassed the employee in front of colleague and clients, prior to the employee's termination. Upon termination, the employer drastically exaggerated the employee's performance issues, alleging cause for termination when it knew or should have known it did not have cause. According to the judge, this conduct as a whole demonstrated an intention on behalf of the employer to not be bound by the employment agreement.

- After the employer terminated an employee, the employer failed to make commission payments properly owed to the employee pursuant to the employment contract upon termination. The employer disagreed with the total amount owed to the employee, but admitted that it withheld payments that it knew the employee was entitled to. In addition to failing to make those payments, the employer demanded the employee sign a "full and final release" which wrongfully implied that entitlements under the contract were contingent on signing the release.

A key takeaway for employers is that the obligations owed towards an employee do not end upon termination. To take full advantage of the benefits of a properly worded severance-limiting termination clause, the employer must at all times be mindful of their conduct towards the employee.

Practical examples or steps that the employer should follow during the period of employment and during/after termination include:

- Ensuring the employee is provided all statutory termination notice, or pay in lieu thereof, entitlements upon termination;
- Ensuring the employee is paid all salary, commission, wages or other amounts owing to the employee up to the date of termination;
- Only seeking a release of liability when offering a payment greater than the minimum entitlement to severance pay provided for by Employment Standards legislation;

continued next page...

Termination Clauses
... concluded from page 13

- Do not allege termination for cause in bad faith or where it is clear that the employer does not have cause; and
- Being mindful of conduct demonstrated to the employee at all times during the employment relationship and specifically in the lead-up to, and after, termination.

Now, you might be asking – what happens when an employer is found to repudiate the employment agreement and can no longer rely on a severance-limiting termination clause? In these circumstances, the employee's entitlement to notice upon termination would be determined by the court's assessment of "reasonable" notice. This involves an assessment by the courts which traditionally considers factors such as age, position, years of service with the employer and availability of similar employment. The period of reasonable notice will be assessed in light of each individual employee's circumstances. For reasons twofold, more often than not, this is detrimental to the employer:

- First, the reasonable notice assessment by a court, in most cases, provides for a much greater entitlement (i.e. severance payment owed) relative to what is set out in the termination clause. This can easily be a difference of tens, or sometimes hundreds, of thousands of dollars

- Second, it creates a significant amount of uncertainty for the employer in determining the severance pay obligations owed to an employee upon termination, as opposed to a formulaic severance-limiting termination clause. Essentially, where the employer and employee cannot agree on the applicable reasonable notice period, it is left up to the court to assess.

Repudiation can turn a seemingly bulletproof contract into a blank cheque.

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