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A "WELL-INTENTIONED" BREACH OF EMPLOYMENT POLICY IS NOT JUST CAUSE FOR TERMINATION

— By Ryan D. Campbell and Kyle Magee. © 2012 Gowling Lafleur Henderson LLP. Reproduced with permission.

Introduction

The recent decision of *Barton v. Rona Ontario Inc.* (*Rona*, 2012 ONSC 3809 (S.C.J.) [*Rona*]) re-affirms the approach to be taken by Ontario Courts in assessing claims for wrongful termination.

In this interesting case, a forklift was used by Rona staff to lift a wheelchair bound employee to the store's second level. Kerry Barton, the store manager and plaintiff, argued that the lift, while technically against Rona's safety rules, was with the best of intentions and merely a misguided attempt to accommodate the employee and allow him to participate in a training program being held on the second floor. Rona disagreed, terminating Barton for breaching his employment contract and the company's health and safety policies. Barton sued Rona for wrongful dismissal. Rona defended, arguing there was just cause for the termination.

After analysing all of the facts, Justice Lauwers of the Superior Court of Justice held that, although Barton had clearly breached his employment contract and the health and safety policies of his employer, the misconduct did not justify his dismissal. As a result, Barton was awarded damages equivalent to 10 months' notice.

The Facts

Barton had been employed as an assistant store manager at Rona's Barrie, Ontario location. In that position, he was responsible for managing about 140 employees, including Kai Malmstrom, who used a wheelchair (*Rona*, para. 3).

The Barrie store had scheduled a training program for April 17, 2009. Malmstrom wanted to attend the training and management wanted to accommodate him. The problem was that the store's training centre was on the second floor and was not wheelchair accessible (*Rona*, para. 4). To accommodate Malmstrom, Barton had spoken to Malmstrom a few days before the training was scheduled to occur, and undertaken to have Malmstrom trained on the main level at a later date (*Rona*, para. 4).

However, on the day of the training, Malstrom and a colleague decided to strap Malmstrom and his wheelchair to a skid and use a large forklift to lift him to the second

floor, thereby accommodating Malstrom and allowing him to attend the training program as scheduled. Malmstrom was later lowered back to the main level in the same manner (the Incident) (*Rona*, para. 5).

While Barton did not personally participate in the Incident and did not give permission for the lift or descent (*Rona*, para. 26), Malmstrom had approached Barton about using the lift to attend the training earlier that day. Barton "tried to convey his discomfort" with the idea and reminded Malmstrom about the plan to train him later. However, Barton did not expressly forbid the lift scheme (*Rona*, para. 31).

Upon learning of the Incident, Rona's human resources department conducted an investigation. Following the investigation, Rona terminated Barton and the employee who had operated the lift (*Rona*, para. 3–7). Malmstrom was not disciplined for his participation in the breach of employer policies.

Positions of the Parties

At trial, Barton admitted that he was familiar with Rona's safety rules and applied the rules in the store. However, he stated that the intention was to accommodate Malmstrom and provide access to the training. Barton stated that he was confident that Malmstrom would be safe, but subsequently admitted to Rona's HR investigator that, in hindsight, he would not do it again.

Rona argued that Barton failed to uphold its safety expectations and so breached the employment contract, justifying his dismissal. Rona submitted that, as a managerial employee, Barton was held to a higher standard, and ought to set an example for the other employees and ensure their subordinates behaved properly. Rona argued that, as a result of Barton's breaches of its health and safety rules and policies, Barton revealed that he was unsuitable as a "role model and authority figure" and the employment relationship (*Rona*, para. 3–7). Rona also correctly identified that Barton's actions may have exposed the organization to regulatory liability under the *Occupational Health and Safety Act* (Section 66(4) of the *Occupational Health and Safety Act*, RSO 1990, c. O.1 provides that an employer may be held liable for acts or neglect of its managers and supervisors. Specifically, "in a prosecution of an offence under any provision of this Act, any act or neglect on the part of any manager, agent, representative, officer, director or supervisor of the accused, whether a corporation or not, shall be the act or neglect of the accused.").

The Decision

In this case, Justice Lauwers noted that Rona is "culturally committed to workplace safety" and such commitment is well reflected in Rona's documentation and practices. Among other things, Rona's employee handbook contains a number of rules designed to ensure employee safety, including that power equipment must be used in a safe manner (*Rona*, para. 16). In fact, according to the handbook, using power equipment unsafely is cause for immediate dismissal (*Rona*, para. 17).

Even though the health and safety policies were not explicitly incorporated into Barton's employment contract by reference, Justice Lauwers held that these policies, including those contained in the employment handbook, formed part of Barton's employment contract and were binding (*Rona*, para. 22–24).

Accordingly, Justice Lauwers recognized Barton's misconduct was serious (*Rona*, para. 54), holding that "Mr. Barton breached his obligations as a manager in failing to take the steps that he could have taken to prevent the lift and to prevent the descent. He did not instruct Mr. Stirk and Mr. Malmstrom not to undertake the lift when he had the opportunity to do so [. . .] nor did he take steps to prevent the descent" (*Rona*, para. 26).

However, Justice Lauwers also recognized that the analysis to be applied by the Court when evaluating cause for termination was more nuanced than Rona suggested (i.e., a breach of the safety rules justifies dismissal). While Rona may have formed the view that Barton lacked the character required of senior management and decided for business reasons to make an example of him, this was a business decision that did not necessarily meet the contextual test required by past jurisprudence.

In particular, Justice Lauwers noted that Barton had historically been a good employee, he did not give permission for the lift and he "tried however ineffectually to prevent the lift" (*Rona*, para. 54). Applying the principle of proportionality

and bearing in mind that termination was the most severe sanction available to an employer, Justice Lauwers held that "this is a situation in which a stern warning to Mr. Barton never again to permit a safety infraction by an employee would have sufficed" and termination was not justified (*Rona*, para. 54).

Therefore, Justice Lauwers held that Rona was entitled to dismiss Barton for its own business reasons, but that doing so was a breach of the employment contract, which entitled Barton to damages equivalent to 10 months' notice (*Rona*, para. 56–66).

Gowlings' Analysis & Recommendations

The *Rona* case highlights the consequences of well-intentioned, deliberate acts of employees that are nevertheless contrary to employer policies and procedures. The outcome is consistent with the current state of the law in Ontario, which allows an employer to discipline employees for failing to comply with policies and procedures, but which does not recognize the universal enforceability of "zero-tolerance" clauses in such policies and procedures.

In applying this contextual approach to cases of wrongful termination, Justice Lauwers recognizes the severity of Barton's behaviour, but concludes that Barton's actions, while certainly misconduct, did not warrant termination — the capital punishment of employment law. One wonders, however, whether the Court's conclusion would have been the same if Malmstrom, another employee or a bystander had been injured during the lift. After all, safety rules are designed to minimize risk and employers, rightfully, ought to expect strict compliance from their employees.

The decision also appropriately recognizes that an employee handbook, and the policies and procedures contained within, can form part of the employment contract even when they are not specifically referred to or incorporated by reference in a contract of employment and even when the policies are modified during the course of employment.

In light of this decision, employers are reminded of the following best practices:

- **"Zero Tolerance" clauses are not universally applicable.** When considering whether to terminate an employee for failing to comply with an employment policy or procedure, the employer must use a contextual approach to balance the severity of the incident with the sanction imposed. As in *Rona*, this often includes a review of the employee's past disciplinary record. It is only in the strongest of cases where a Court will treat an employee's failure to comply with a policy or procedure as just cause for termination.

- **Employers should respond to violations of employment policies or procedures with progressive discipline.** In *Rona*, the Court suggests that Rona should have disciplined Barton prior to dismissing him. Employers should regularly monitor compliance with employment policies and procedures, and discipline employees (including supervisors) found to be in contravention. Enforcement of occupational health and safety policies and procedures is particularly important, given the maximum penalties to an organization of $500,000 for each contravention of the *Occupational Health and Safety Act* and/or regulations made under the Act.

- **The duty to accommodate requires respect for dignity.** The needs of persons with disabilities must be accommodated in a manner that most respects their dignity, to the point of undue hardship. This may prevent an employer from excluding an employee with a disability from a team event if attendance can be facilitated without causing undue hardship on the organization. As in *Rona*, however, attempts to accommodate should never trump the basic principles of employee safety.

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LEGISLATIVE UPDATE

Federal Government Introduces Second Budget Bill

On October 18, 2012, the federal government introduced Bill C-45, the *Jobs and Growth Act, 2012*, another large, omnibus Bill that contains amendments to implement certain provisions of the 2012 federal Budget. The Bill proposes amendments to many Acts, including the *Canada Labour Code* and the *Employment Insurance Act*.

If passed, Bill C-45 will amend the *Canada Labour Code* to:

- simplify the calculation of holiday pay;
- set out timelines for making certain complaints under Part III of the Code, and the circumstances in which an inspector may suspend or reject such complaints;
- set limits on the period that may be covered by payment orders; and
- provide for a review mechanism for payment orders and notices of unfounded complaint.

The Bill also proposes to amend the *Employment Insurance Act* to extend the hiring tax credit for small businesses. An employer whose Employment Insurance premiums were $10,000 or less in 2011 will be refunded the increase in 2012 premiums, to a maximum of $1,000.

Other proposed amendments to the *Employment Insurance Act* would dissolve the Canada Employment Insurance Financing Board and enact an interim Employment Insurance premium rate-setting regime.

Bill C-45 received first reading in the House of Commons on October 18, 2012 and second reading on October 30.

Alberta Introduces *Employment Pension Plans Act*

On October 25, 2012, the Alberta government introduced Bill 10, the *Employment Pension Plans Act*, which will make it easier for private sector employers to have affordable, workable pension plans. The proposed Act is the result of the work started when the Alberta and British Columbia governments appointed a joint panel on pension standards to consider options of how to harmonize and modernize the two provinces' private sector pension legislation.

Highlights of the Act include:

- Harmonized pension rules between Alberta and British Columbia, making it easier for pension plans to both start up and operate effectively for their members.
- More flexibility in pension standards, making it easier for private sector employers to design pension plans that meet both their needs and the needs of their employees.
- Extended timelines for dealing with funding shortfalls.
- More clarity around the roles and responsibilities of those involved in managing pension plans.
- Standards for two new types of plans:
  - Target benefit plans provide a specific pension amount when a member retires, similar to a defined benefit plan. The benefit amount may be revised if funding difficulties arise, lowering employer funding risk. To ensure plan members can have reasonable confidence their promised benefit will be delivered, specific funding rules for these plans will be put into place.
  - Jointly sponsored plans see members share in the total cost of the plan with the employer, as opposed to contributing only towards their own benefit.

- Increased focus on disclosure, helping all parties understand the terms, risks, and health of their plan, as well as their responsibilities around the plan.
- Qualification for vesting, which is the entitlement of a member to the benefit promised under their pension plan, has been changed from two years of plan membership to immediate, recognizing that pension benefits are a part of an employee's compensation, rather than a reward for long service.
- Locking in will no longer be based on years of service, but will be based on a minimum dollar amount that is increased annually. This will eliminate the locking in of amounts that are too small to provide a meaningful pension, and means that locking-in rules will keep pace with inflation.

Bill 10 received first reading on October 25, 2012 and second reading on November 5.

Ontario's Proposed Family Caregiver Leave Will Not Go Forward

Bill 30, *An Act to amend the Employment Standards Act, 2000 in respect of family caregiver leave*, which was previously reported in the *Mercer/CCH Guide for Employers* Newsletter No. 23, dated September 2012, will not go forward.

On October 15, 2012 the Ontario Legislature was prorogued. As a result, all Bills before the legislature that had not been passed died on the order paper. For family caregiver leave to go forward, a new Bill will need to be introduced when the legislature resumes.

Ontario Implementing Mandatory WSIB Coverage for the Construction Industry

In Ontario, new rules for mandatory coverage in the construction industry become effective January 1, 2013. As of that date, Workplace Safety and Insurance Board ("WSIB") coverage will be mandatory for the following people who work in construction:

- independent operators;
- sole proprietors;
- partners in partnerships; and
- executive officers in corporations.

There are exemptions for home renovators, executive officers, and partners. The exemption for home renovators applies to those who do not employ workers, work directly for the homeowner, and are paid directly by the homeowner.

The other exemptions apply to corporations and partnerships with workers, corporations without workers but with multiple executive officers, and partnerships without workers. Any of those businesses may select one executive officer or partner to apply for an exemption.

In addition, both the principal and the contractor/subcontractor will have obligations to obtain clearance certificates starting January 1, 2013. Principals must require contractors/subcontractors to provide clearance certificates before beginning any construction work. Contractors must have WSIB coverage, report and pay their premiums on time so they are eligible for a clearance certificate, and provide a clearance certificate prior to starting any construction work.

New resources to support mandatory coverage in construction are available on the WSIB website: http://www.wsib.on.ca.

Northwest Territories Passes Bill To Prohibit Discrimination on the Basis of a Criminal Conviction Subject to a Record Suspension

The Northwest Territories has passed Bill 12, *An Act To Amend The Human Rights Act*, which will expand the definition of discrimination on the ground of criminal conviction. Currently, the *Human Rights Act* prohibits discrimination only on the basis of "a conviction for which a pardon has been granted." Bill 12 will amend the Act to prohibit discrimination on the basis of "a conviction that is subject to a pardon or record suspension."

A "pardon or record suspension" will be defined as:

> a pardon that has been granted under Her Majesty's royal prerogative of mercy or under section 748 of the *Criminal Code*, or a record suspension that has been ordered under the *Criminal Records Act* (Canada), unless the pardon or record suspension has been revoked or has ceased to have effect;

Bill 12 received first and second reading on October 29, 2012, and third reading and Royal Assent on November 6.

Saskatchewan Introduces New Workers' Compensation Legislation

On November 5, 2012, the Government of Saskatchewan introduced Bill 58, *The Workers' Compensation Act, 2012*, which would repeal and replace the province's current *Workers' Compensation Act, 1979*.

The Act intends to eliminate inconsistencies, clarify legislative applications, and improve benefits for injured workers. Highlights include:

- improving benefits for injured workers by increasing the maximum insurable earnings;
- introduction of a system of indexation to ensure benefits are adjusted annually;
- allowing workers, upon reaching age 65, to choose between purchasing an annuity or receiving a lump-sum payment; and
- providing the board with the ability to assess administrative penalties.

The maximum wage rate, the upper limit on earnings used for the calculation of benefits, will increase from $55,000 to $59,000 for new claims. The maximum wage rate was last increased in 2005.

The new Act also contains an indexation formula based on increases to the average weekly wage.

Additionally, all current claimants in the province will receive an annual increase in benefits to ensure they are consistent with inflation.

The Act has also been modernized and restructured to improve readability and ease of use by removing gender-specific language, using consistent terms, and improving clarity and ease of use for stakeholders.

CRIMINAL SAFETY CHARGES AGAINST COMPANIES AND SUPERVISORS: A GROWING CONCERN?

— By Adrian Miedema, © Fraser Milner Casgrain LLP.

Two recent cases suggest that criminal safety charges against companies and supervisors are not just a theoretical risk anymore. According to the first decision, a company can be criminally liable for the actions of a supervisor that the company's principal was not aware of. According to the second decision, a supervisor can be criminally liable for not ensuring that safe work procedures were followed, even if the supervisor was not aware of the safety violation and was not present at the time of the accident.

The first case, *R. v. Metron Construction*, 2012 ONCJ 506 (CanLII), arose out of the tragic deaths of four Ontario workers on Christmas Eve, 2009 when a swing stage (a suspended work platform) collapsed and they fell to their deaths. In June 2012, Metron pleaded guilty to charges of criminal negligence because of its supervisor's actions, even though the principal of Metron was not on the site at the time of the accident. That case generated much media attention and discussion about when criminal safety charges are appropriate against employers and their managers or executives.

In the second case, *R. v. Hritchuk*, 2012 QCCS 4525 (CanLII), a supervisor at a Quebec automobile dealership pleaded guilty to the criminal offence of unlawfully causing bodily harm when one of the employees was burned transferring gas out of a car's gas tank using what the Court described as an "old home made method". In March 2012, Hritchuk pleaded guilty, even though he was not aware of the "home made" method being used and was not present at the time of the accident.

Metron Case: Employer Criminally Liable

Metron admitted that its site supervisor was a "senior officer" of the company. As such, the supervisor's actions were taken to be the actions of Metron for the purposes of the criminal negligence charges against Metron. The site supervisor had directed and/or permitted six workers to work on the swing stage when he knew or should have known that it was unsafe to do so; directed and/or permitted the six workers to board the swing stage knowing that only two lifelines were available; and permitted persons under the influence of drugs to work on the project.

The principal of Metron, Swartz, was not at the accident site at the time of the accident. Also, there is no suggestion in the Court's decisions that Swartz was aware of the site supervisor's actions that led to the accident. Nevertheless, Metron pleaded guilty to the charge of criminal negligence on the basis that the supervisor's actions were, legally, taken to be those of Metron, and the Court accepted that guilty plea and convicted Metron.

Metron was fined $200,000 plus a 15% victim fine surcharge. Swartz pleaded guilty to four charges under the Ontario *Occupational Health and Safety Act* and was fined a total of $90,000 plus a 25% victim fine surcharge.

The Crown had asked for a $1 million fine against Metron, and Metron had argued for a $100,000 fine. In the charges against Swartz, the parties had agreed upon the fine of $90,000. The Crown has appealed the fine against Metron, arguing that the $200,000 fine was too low.

Hritchuk Case: Supervisor Pleads Guilty to Criminal Offence

Hritchuk, the supervisor at the automobile dealership, was originally charged with criminal negligence causing bodily harm, but that charge was stayed when he pleaded guilty to the criminal offence of unlawfully causing bodily harm under section 269 of the *Criminal Code*. That section states that:

> Every one who unlawfully causes bodily harm to any person is guilty of (*a*) an indictable offence and liable to imprisonment for a term not exceeding ten years; or (*b*) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Hritchuk was the immediate supervisor of the injured worker, but was in his office and not present at the time of the accident. The Court accepted that he was not aware of the procedure used by employees to transfer gasoline out of the gas tank, and that Hritchuk had thought that siphoning was used.

Through his lawyer, Hritchuk admitted that the Crown would be able to prove that the injuries to the injured worker were caused by an "underlying unlawful act" which was objectively dangerous. The Court's decision does not clearly state what the "underlying unlawful act" was. However, the Court appears to have accepted that the unlawful act was Hritchuk's failure to ensure that proper safety procedures were followed:

> As service manager, the accused was responsible for ensuring that proper procedures, pursuant to *Volkswagen* guidelines, were followed. If the appropriate device was not in working order, it was his responsibility to have it repaired or to obtain one in working order. It was his duty to prohibit the use of the home-made pump.

The fact that a failure to ensure that "proper procedures" were followed, could form the basis for criminal liability to a supervisor is concerning. In this case, there was no evidence that Hritchuk knew about the hazard or "turned a blind eye" to it. One could say that Hritchuk was found guilty for failing to do something that he should have done, as opposed to doing something that he should not have done. It was a "sin of omission", not a "sin of commission".

Although the Court ultimately granted an "absolute discharge" to Hritchuk, meaning that he does not have a criminal record, Hritchuk was still required to plead guilty in order to achieve that result, and had criminal charges hanging over his head for seven years.

Pressure for More Charges

It is worth noting that union groups, including the Ontario Federation of Labour ("OFL"), have been pushing for prosecutors to lay more criminal safety charges. The OFL notes, on its website, that the OFL's president "had harsh criticisms for a judicial system that continues to let criminally negligent employers walk free after they put the lives of workers at risk." In 2010, a BC union even tried to advance a private criminal prosecution against an employer, but the Court ultimately stayed that prosecution at the request of the Crown.

Lessons for Employers and Supervisors

Perhaps the main lesson from the *Metron* case is that companies can be criminally liable for actions of supervisors — not only actions of senior executives. Metron's site supervisor, who tragically died along with three other workers, had committed serious safety breaches on the day of the accident, but there is no evidence in the decisions that the company's principal was aware of those breaches. As a result, employers — particularly those in safety-sensitive industries — should redouble their efforts to ensure that all supervisors are fully aware of their safety obligations and adhere to those obligations throughout the work day. Employers must be able to trust that their supervisors, when not themselves supervised, are complying with safety standards and making safety a priority.

The lesson for supervisors from the *Metron* and *Hritchuk* cases is twofold: first, that a supervisor's actions can result in criminal liability for his or her employer, and second, that the supervisor him or herself can be criminally liable for failing to ensure that proper safety procedures are followed. Supervisors should require their employers to provide them with appropriate safety training to equip them to identify hazards and rectify them quickly. Since a mere failure to follow proper safety procedures was apparently sufficient for criminal guilt in the *Hritchuk* case, supervisors should learn and follow those procedures.

Although there have still been relatively few criminal safety charges since Bill C-45 amended the *Criminal Code* in 2004 to specifically introduce workplace safety duties in criminal negligence law, the *Metron* and *Hritchuk* decisions, and growing pressure from unions, suggest that the risk of criminal safety charges can no longer be ignored.

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RISING TO THE CHALLENGE: OBTAINING FURTHER EMPLOYEE MEDICAL INFORMATION

— By Gerald J. Griffiths, Sherrard Kuzz LLP. This article originally appeared in Focus on Canadian Employment and Equality Rights, *Vol. 9, No. 34, October 2012.*

The recent Federal Court decision of *Picher v. Innotech-Execaire, A Division of I.M.P. Group Limited*, 2012 FC 442 serves as a reminder of when and how employers may challenge medical information provided by employees.

Facts

The applicant employee, Picher, was employed as a full-time receiver in the shipping department of Innotech-Execaire ("Innotech"). Picher left work one day saying his wife was ill. The next day, Picher also advised he was ill and would not be attending work. Picher remained absent from work for a week before Innotech called him to find out when he would return. A day later, Picher responded with a vague note from his family doctor indicating simply that Picher was "unable to work at present for medical reasons."

At Innotech's request, Picher subsequently returned completed disability forms which included a statement from his family doctor that Picher was in a depressive state and could not return to work for three months. Innotech followed up with Picher, who then raised an additional reason for his absence: issues he had with his co-workers.

Innotech, questioning Picher's shifting reasons for his leave, required him to undergo an independent psychological assessment. Picher consented. Dr. Gauthier, a psychiatrist, examined Picher and issued a report indicating that while Picher was tired and suffered from anxiety issues, he was medically able to return to work. This was based, in part, on Dr. Gauthier's conclusion that Picher was not taking the medicine prescribed by his family doctor and that, if he did, his anxiety would likely diminish.

Upon reviewing Dr. Gauthier's report, Innotech wrote Picher demanding he return to work or be deemed to have resigned. Picher refused to return. Instead, he filed a complaint with Human Resources Development Canada, Labour Branch taking the position he was sick and therefore protected by section 239(1) of the *Canada Labour Code* (the "Code") which prohibits dismissing an employee because of an absence for a period of 12 weeks or less due to illness. Picher's complaint was heard by an adjudicator appointed under the Code, who held Innotech was entitled to treat Picher's employment as having ended by his failure to return to work.

The Decision

Picher sought a judicial review of that decision in Federal Court on a number of grounds, including that the adjudicator erred in preferring the report of Dr. Gauthier over the report of his family doctor, that Picher did not consent to the examination by Dr. Gauthier, and that Innotech acted in bad faith in making the requests it did.

The adjudicator's decision was upheld on judicial review. The Court noted that Innotech had every reason to be concerned regarding Picher's "movable feast" of reasons for his absences: his sickness, the sickness of his wife, and problems with his co-workers. It was therefore open to Innotech to request that Picher undergo further medical evaluation.

Further, Picher consented to the independent medical examination and, as such, it was not open for him to now argue that a master-servant relationship "compelled him to attend". The Court also concluded it was open to the adjudicator to prefer the report of a psychiatrist over the family doctor due to the psychiatrist's expertise and the additional detail contained in his report.

Lessons for Employers

This decision highlights a situation commonly confronted by employers where an employee purports to absent himself from work for medical reasons under suspicious circumstances and is reluctant to provide useful medical information. This case serves as a reminder of some key points for employers facing such situations:

- A doctor's note indicating that an employee will be absent for a certain period of time does not provide an employee with an unlimited licence to remain absent from work.
- Employees must take part in accommodation efforts and are not entitled to ignore recommended treatment plans without reason.
- Employers are entitled to challenge medical documentation provided by their employees, including by requesting an independent medical examination where there is some ambiguity or inconsistency in the medical evidence or reasons provided to justify the absence.
- Consent to a medical examination will not be vitiated merely by the perceived power imbalance of the employee-employer relationship.

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Q & A

When can an employer use pre-employment testing?

Any pre-employment test given must in some way measure the applicant's ability to do the job. In choosing a test, you should make inquiries about any research done to validate the test's reliability and to ensure it does not contain any inadvertent cultural bias. If the test is not relevant to the job, do not use it. Also, never develop tests in-house, especially personality or psychological testing, to be used to screen candidates. Considerable expertise and research is needed even for the simplest of tests to ensure reliability, validity, and absence of cultural bias.

There are limits to what employers can test for. Typically, tests are used to demonstrate proficiency in a skill (e.g., keyboarding speed), measure job knowledge, verify physical ability (e.g., strength, dexterity, fine motor skills), or behavioural traits. You should always consult with a specialist and, when appropriate, legal counsel to ensure that any tests used do not create direct or indirect discrimination based on a prohibited ground.

Most pre-employment tests are designed to quantitatively measure specific attributes, such as an applicant's knowledge, skills, aptitudes, or attitudes that are necessary to do a particular job. In theory, with the right test, an employer can use a test's scores to *predict* which of the many applicants will perform the best. Different organizations have different needs and philosophies when it comes to pre-employment testing. Some organizations test actual job skills, while others test for aptitude.

Before administering any test, you need to be aware of the potential problems testing can bring. Using pre-employment testing as an aid to making hiring decisions can result in better decisions — if tests are reliable and valid and are selected and administered correctly.

EMPLOYERS FOCUSED ON INCREASING EMPLOYEE ENGAGEMENT AS JOB MARKET IMPROVES

With the improving economy and job market, concern about engaging employees and retaining critical talent is top of mind for many employers. According to Mercer's 2012 Attraction and Retention Survey, more than 40 per cent of participating organizations are expanding their overall workforce in 2012 compared to just 27 per cent in 2010. Moreover, fewer organizations today than two years ago are making selected reductions to their workforce (16 per cent versus 25 per cent, respectively). Despite this positive news, more organizations are reporting a decline in employee engagement compared to two years ago (24 per cent versus 13 per cent, respectively).

Mercer's 2012 Attraction and Retention Survey examines the strategies that organizations are using to promote employee attraction, retention and engagement in this time of cautious growth. It includes responses from more than 470 employers across all industries throughout the US and Canada with over one third of responses coming from Canada.

"Employee loyalty has been eroding the past few years due to companies' responses to the economic downturn," states Iain Morris, Mercer's Human Capital Business Leader. "Actions like layoffs, pay freezes and limited training opportunities have altered the employment deal for employees, and created uncertainty about what is expected and how they will be rewarded."

Half of the participating organizations in Canada are anticipating increases in voluntary turnover as the job market and economy continue to improve.

"Employees with the 'right' skill sets that meet specific business needs continue to be in demand," explains Anne Peiris, Principal with Mercer's Human Capital consulting business in Canada. "Many companies are experiencing talent shortages due to critical gaps between the skills employees have and skills that businesses need".

Cash and non-cash rewards, will continue to play an important role in fostering employee engagement and retention in this environment. Approximately 85 per cent of participants in Canada indicated that attracting, hiring, engaging, and retaining the right talent will be of critical importance to their organization in the short term. During times of limited merit budgets, non-cash rewards will play an even greater role in this effort.

The most prevalent non-cash reward programs implemented by organizations over the past 18 months include: communicating total reward value to employees, use of social media to boost the employee experience, formalizing of career paths, increased internal/external training and use of special recognition programs.

Although use of non-cash rewards continues to grow, top reward elements expected to have the biggest impact on employee engagement and retention in 2012 are reported to be base pay increases (50%), followed by vertical career progression (47%) and leadership development (46%). Within Canada specifically, leadership development (52%) outranked base pay (50%) and vertical career progression (44%).

"While non-cash programs such as work life initiatives and formal career paths are important for employee engagement in any economy, employers must not lose sight of pay in today's business environment in order to stay competitive, retain their top-performing employees and ultimately ensure the right skills are in place to drive the business forward," adds Morris.

For more information, visit www.mercer.ca. Follow Mercer on Twitter @MercerInsights.

ON THE CASE

Removal of Bonuses from Employee's Remuneration Constituted a Constructive Dismissal

Supreme Court of British Columbia, July 18, 2012

Piron worked as a foreman for Dominion Masonry Ltd. ("Dominion") for 19 years. He was paid an hourly wage, which was eventually supplemented with bonuses. The bonuses were significant, although they varied depending on the size and the complexity of the projects on which Piron worked. When Dominion attempted to reduce Piron's bonuses, because it was having difficulty finding larger projects, Piron refused to agree to the new terms. There were some discussions about partial ownership or profit sharing; however, no agreement was reached. Eventually, Dominion informed Piron that he could either accept a base salary, without bonuses, or leave the company. Piron brought an action for constructive dismissal.

The action was allowed. The bonuses paid to Piron had become a significant part of his remuneration. The economic conditions had changed, and economic circumstances can lead to a substantial change to an employment contract. However, the process of change should be through negotiation, not through a unilateral imposition of lower compensation. The ability to negotiate a higher amount of remuneration, project to project, was a significant feature of Piron's employment which led to significant income and higher status. Therefore, the removal of the bonus from Piron's remuneration was a unilateral change to his terms of employment, constituting a constructive dismissal. Piron was awarded 15 months of severance.

Piron v. Dominion Masonry Ltd., 2012 CLLC ¶210-047

Punitive Damages Award Increased to $550,000

Ontario Superior Court of Justice, November 16, 2011

Pate became a building inspector for the amalgamated Township of Galway and Cavendish. Less than three months after amalgamation, he was informed that discrepancies had been uncovered with respect to permit fees, and that he was being terminated. Pate was acquitted of all criminal charges relating to these issues. Pate brought a wrongful dismissal action, and the parties agreed to award him 12 months' reasonable notice. The trial judge awarded him special and aggravated damages, as well as punitive damages in the amount of $25,000 (see 2010 CLLC ¶210-008). An appeal was allowed, and a new trial was ordered on the issue of the Township's conduct, in order to reconsider the quantum of punitive damages (see 2011 CLLC ¶210-042).

The punitive damages award was allowed. As determined in the original trial, Pate was entitled to compensation for bad faith conduct in the manner of his dismissal, which caused additional humiliation, embarrassment, and damage to his self-worth and self-esteem. The conduct of the Township prevented Pate from searching for alternate employment within the municipal field, and the allegations of misconduct, including theft, were not supported by any evidence. Therefore, Pate was entitled to an award of punitive damages as a fine for conduct by the Township that was deemed worthy of punishment. Given the significant misconduct by the Township, the fact that the misconduct lasted over a 10-year period, the devastating impact of these actions on Pate's life, and the fact that these were intentional and foreseeable actions undertaken by the Township, Pate was awarded punitive damages of $550,000.

Pate (Estate) v. Galway-Cavendish (Township), 2012 CLLC ¶210-050

Employee Was Discriminated Against When She Was Terminated After Taking Disability Leave

British Columbia Human Rights Tribunal, June 28, 2012

Just prior to starting work for Prime Time Sports, Bateman was diagnosed with endometriosis, which caused her substantial pain and required a hysterectomy. She informed her employer that she would need time off for the surgery. Prior to the surgery, a shipment of Olympic merchandise arrived at the store while the owners were on vacation. When they arrived back, five days after the delivery, the shipment was still not displayed. Soon after, Bateman had her surgery. When she went in to work to find out when she would return, she was told that she was being dismissed because of a shortage of work. The person who had been hired to fill in part-time while Bateman was recovering from her surgery remained employed by Prime Time Sports. Bateman brought a human rights complaint, alleging discrimination on the basis of physical disability.

The complaint was allowed. Endometriosis was found to be a disability, and while on disability leave, Bateman was terminated while her replacement remained employed. Bateman's disability was at least a factor in her dismissal since, if not for her taking disability leave, the employer would not have been able to compare Bateman to the replacement employee, and ultimately decide to keep the replacement. Therefore, a *prima facie* case of discrimination had been made out. There was no evidence of a *bona fide* occupational requirement, and as a result, the complaint was justified. Bateman was awarded $5,000 for injury to dignity, along with two months' wages.

Bateman v. Prime Time Sports, 2012 CLLC ¶230-026

Employee Who Was Terminated One Day After Disclosing Her Pregnancy Was Discriminated Against

British Columbia Human Rights Tribunal, August 2, 2012

BNA Smart Payment Systems, Ltd. ("BNA") hired Kooner-Rilcof as an "at-will" employee to develop its business in British Columbia, and eventually named her the vice president of sales. During the economic downturn, BNA determined that it needed to reduce costs since sales were down. As a result, it decided to terminate Kooner-Rilcof, despite her notable work for the company. Prior to being informed of her termination, Kooner-Rilcof advised BNA that she was pregnant and would be taking maternity leave in late December or early January. The next day, BNA informed Kooner-Rilcof that it was closing its operations in British Columbia, and that she was being let go. Kooner-Rilcof brought a human rights complaint, alleging discrimination on the basis of pregnancy.

The complaint was allowed. Kooner-Rilcof was pregnant, and was terminated one day after informing her employer that she was pregnant and would be taking maternity leave. These circumstances led to the inference that her pregnancy was an operative factor in her termination, particularly because she had received no prior warning that her job was insecure. Therefore, Kooner-Rilcof established a *prima facie* case of discrimination. BNA did not provide a non-discriminatory explanation for terminating Kooner-Rilcof's employment when they learned about her pregnancy, and therefore, it discriminated against her on the basis of sex, namely pregnancy. Kooner-Rilcof was awarded two weeks' worth of lost wages, and $8,000 for injury to dignity, feelings, and self-respect.

Kooner-Rilcof v. BNA Smart Payment Systems, Ltd., 2012 CLLC ¶230-027

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