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## EMPLOYMENT NOTES AND NEWS

*Dear Friends;*

*These articles should assist with the challenges of people and issues management. Selected past issues of this newsletter are available on our web site. Alternatively, hard copies are available upon request. All best regards for a safe and happy summer.*

*Sincerely;*

*Jay Josefo*

### I

## **THE VELVET GLOVE COVERS THE IRON FIST**

### **KEEP "JUST CAUSE" FOR DISMISSAL IN RESERVE WHERE APPROPRIATE**

Conventional wisdom provides that if "just cause" exists for dismissal from employment, then it must be asserted when the employee is dismissed. Some also believe that if an employer does not assert just cause at the time of dismissal, then the employer has waived its right to do so ever after.

Yet, the above statements are incorrect. The Ontario Court of Appeal recently confirmed that an employer that did not assert just cause immediately at dismissal was not precluded from subsequently defending the wrongful dismissal action by asserting just cause.

In *Giancola v. Jo-Del Investments Ltd.*, the termination letter referred to a “reorganization” as explanation for the dismissal. Yet, the Court held that this did not preclude the employer from asserting just cause to dismiss Mr. Giancola when the matter later became litigious. The Court referred to and relied upon an earlier decision, that of *Tracey v. Swansea*. This 1965 case confirmed that an employer is not obliged to inform the dismissed individual of the reasons for his or her dismissal. The decision also confirmed the doctrine of “after-acquired cause”.

“After-acquired cause” refers to facts that the employer discovers only after the termination has taken place. Yet, if these facts had been discovered before dismissal, they would have justified the employee’s dismissal for just cause.

In the more recent *Giancola* decision released in 2003, the manager of a banquet hall with eighteen years of service unilaterally departed on a five-week holiday on extremely short notice. Mr. Giancola took this action though he had been previously warned that, if he left on holiday at that particular time, he should not plan to return. Not only did Mr. Giancola leave for his holiday, he did not even make formal arrangements to cover off his absence. Rather, he presumed that other management team members would fill in as required.

The Court concluded that for a manager to have left on an extensive holiday, without adequate notice or securing consent from his employer, was wrong. The Court concluded that this precipitous conduct on the part of Mr. Giancola provided the employer with just cause for his dismissal.

The Court also noted that the employer had attempted to avoid conflict when, after a month following Mr. Giancola’s return from his unauthorized holiday, he was dismissed. Despite this delay, the Court concluded that the “ambiguous situation” existing for one month did not preclude the employer from alleging cause as a defence to the claim. Given the facts, the Court found that the employer successfully asserted that the employment had been terminated for just cause.

### **LESSONS TO BE LEARNED:**

- ② Prior to dismissing an employee, it is prudent to consider whether just cause exists. There must be more than just a “feeling” that just cause exists. There must be clear and convincing evidence of unacceptable conduct or repeated poor performance despite warnings, and thoroughly documented communications between the employee and the employer.
- ② Whether just cause exists in a particular case is dependent upon the facts and evidence. An employer should take care not to allege just cause if it does not exist, or if the evidence is, at best, “shaky”. An employer that recklessly asserts just cause can be subjected to costs sanctions, as well as to increased damages awarded to the dismissed employee.
- ② If, after careful review, it is concluded that just cause exists, the question becomes whether it should be asserted, or reserved. Asserting just cause often paints the dismissed employee into the proverbial corner. If the dismissed employee is provided with nothing, then he or she might well conclude that it would be worthwhile to commence legal action because, having been given nothing by the employer, he/she has little to lose. An employer who wins the litigation could conceivably receive an award of costs against the departed employee. Yet, collecting upon that cost award could be—and often is—a mirage.

- ② Consider allowing the departing employee to “save face”, even if cause exists. In those ambiguous circumstances or in situations where it is not clear whether cause actually exists, it may be appropriate to offer a “package” as well as provide an ambiguous reason such as a “corporate reorganization” for the dismissal. This allows the employee to “move on” with life, and allows the employer to find a more suitable replacement. The package would only be provided in exchange for a full release.
- ② If the departing employee is greedy and unwilling to move on, however, then the just cause in reserve can be brought forward. At the first sign of pending litigation, such as the receipt of correspondence from counsel for the departed employee, or the receipt of a statement of claim, the employer can change its position and assert just cause. Then the employer should make full disclosure of the reasons for the dismissal, to try to avoid the further expense and use of management time, as well as the increased legal costs of defending an action through to trial.
- ② In certain situations including employee theft, or assault upon a supervisor or customer, not asserting just cause at the outset may be problematic. An employer should protect its assets as well as its employees from dishonest or violent individuals. Moreover, not asserting cause when a blatant act of theft or violence occurs sends, in my view, entirely the wrong message to the responsible individual, remaining employees and customers who are impacted. In clear-cut circumstances, for deterrence and other legitimate legal and business reasons, just cause should be asserted as the employer’s position at the outset. Sometimes, a line must be drawn.
- ② But, most circumstances are not all that *black and white*. We live in a world of nuances, with various shades of grey. In many cases, there will be ambiguity. For those situations, a moderate approach and holding fire in reserve until necessary may be most suitable, and may also reduce needless litigation, legal expense and management time expended on reaction, instead of more positive and forward looking action.
- ② For unionized workplaces, labour arbitrators may take a different view of evidentiary matters concerning a discharge. In some circumstances, arbitrators have concluded that after-acquired evidence may not be introduced nor relied upon by employers.



## II

### **EMPLOYMENT STANDARDS ACT AMENDMENTS IN THE WORKS**

The Ontario government has unveiled amendments to the *Employment Standards Act* (“ESA”) with Bill 63. The Bill has had first reading. It is predicted to proceed through the legislature and receive Royal Assent by next year. It is expected to come into force on January 1, 2005, though this depends upon the legislative schedule.

The recently elected government of Ontario proposes to undo some of the changes made by the prior administration. Currently, Section 17 of the *ESA* allows an employer and employee to agree to extend the workweek up to sixty hours, though the normal workweek is forty-eight hours. Once the Bill comes into force, prior agreements between employers and employees regarding extensions of the workweek will be of no force and effect.

The Liberal government proposes to limit the right of the workplace parties to agree to extend the workweek up to sixty hours. The hours of work will be limited to forty-eight in a week unless:

- (a) There is a written agreement from the employees (or from their bargaining agents in a unionized workplace) to extend their work hours, *and*,
- (b) The employer has been granted an approval for the extension by the Director of the Employment Standards and Practices Branch (the “Director”).

Readers may recall that, prior to 1995, the *ESA* provided for permits to be issued by the Director for various items, including for extensions of hours of work. That process was, however, cumbersome and did not allow flexibility that “just in time” production and other workplaces often require.

Under Bill 63, we are assured that the permit system will be flexible, at no fee, with the use of straightforward forms, online filing, and timely responses. Time will tell if the ease and convenience promised actually materializes.

Bill 63 provides that, when the Director uses discretion to determine whether a permit should be provided, an employer’s compliance history and the health and safety of employees will be considered. The Bill also provides that if a response from the Director has not been received, consenting employees may work the additional hours of up to a maximum of sixty in a week, thirty days after the application has been made.

Approvals will have a sun-set provision. They will expire no later than three years after having been issued. If a proposed workweek is to exceed sixty hours, then the approval will not extend beyond one year.

The Bill also provides that employees must be provided with certain information from the Director. This “official information” will further inform employees as to their rights regarding hours of work and entitlement to overtime. Other amendments contained in Bill 63 will require employers to post certain Ministry of Labour supplied posters with respect to the *ESA* and Regulations.

Employers will also be required to keep records with respect to overtime agreements as well as hours of work for three years after the work was completed or the overtime was no longer required. Other records, including vacation time and vacation payable, will also have to be maintained.

The government promises much stricter enforcement of the *ESA*. Surprise inspections are planned. While the Bill is pending, this is likely a good time for employers to review their overtime, hours of work and other *ESA*-related policies and practices. Employers should ensure they are in compliance with the *ESA* as it currently exists, as well as plan to maintain compliance after the *ESA* is amended.



### III

#### **WORK PLACE PRIVACY – THE “NEXT BIG THING”**

Effective January 1, 2004, the Federal law that regulates privacy, The Personal Information Protection and Electronic Documents Act (“*Act*”) allegedly covers every Ontario organization that discloses, collects or makes use of personal information as part of a business activity or commercial activity within the Province. This *Act* is said to apply within the Province of Ontario because Ontario, amongst other Provinces, has not brought forward their own privacy legislation.

Thus, given that the *Act* arguably applies in some way, should employers take steps? What action should employers take?

Since at least late 2003 some consultants have urged employers to engage in lengthy and expensive processes that would, purportedly, assist employers to comply with the *Act*. It is not clear, however, to what extent, if at all, some of those expensive processes being urged upon employers were actually required.

The *Act* does arguably regulate the collection, use or disclosure of personal information in the course of commercial activities. Personal information has been generally defined to mean any information that can be used to identify an individual, but excludes job titles, office addresses, office email, fax and telephone numbers.

The *Act* does not, however, apply to the collection, use or disclosure of information with respect to employees in the provincial private sector. Section 4 of the *Act* provides that it only applies “in respect of personal information...about an employee of the organization...in connection with the operation of a federal work, undertaking or business” [emphasis added].

Accordingly, employers governed by federal legislation, such as banks, railways, airlines, and certain other businesses including those in the telecommunications sector, must comply with the *Act*. Yet, private sector employers, not engaged in the operation of a federal work, undertaking or business and governed by Ontario law, do not have to comply with the *Act* with respect, specifically, to employee privacy issues.

Accordingly, the compliance requirements in my view have been exaggerated. It is trite that history repeats itself. Many readers will recall in the early 1990’s in Ontario the Employment Equity initiative. This initiative was mercifully put to death by the government elected in 1995. Yet, while it existed, with all its attendant bureaucracy, a cottage industry of “equity consultants” developed to relieve employers of their revenue streams in order to help employers comply with employment equity or, as I called it, the “quota law”. When the quota law was repealed after 1995, those consultants were required to move on to other *solutions in search of a problem*. The new privacy legislation is just one recent example of such an opportunity.

As a consultant in the legal arena, I do not wish to appear too hard on those who consult in other areas. But, before employers rush to fix something that may not be broken, consider whether there really is a problem for which a solution must be found. In Ontario, workplace privacy rights

arguably already exist, expressed in collective agreements or implied through Human Rights, Employment Standards, and other legislation.

Thus, to ensure compliance with existing legislation, prudent employers might review their general approach to workplace privacy issues as well as to privacy issues involving interaction between their customers and employees. These suggestions are, for the most part, “non-invasive surgery”.

**Suggestions for Review:**

1. Review your employment policy regarding the personal use of company e-mail and voice mail. The policy should clearly indicate that employees who use company equipment do not have an expectation of privacy, and that the company monitors the use of equipment to ensure that such personal use is reasonable and not detrimental to company interests.
2. Be very careful when considering surveillance of employees. If employee misconduct is suspected, existing arbitration and wrongful dismissal case-law provides that an employer must use the least invasive method possible to obtain information that is necessary and justified in the circumstances. In general, the courts do not approve of gratuitous “snooping”, which should be avoided unless there is strong justification for random monitoring that is industry specific.
3. Ensure that employee information is stored, whether electronically or in hard copy, in a safe and secure fashion. Ensure that private employee information is only seen by those in the organization that needs to know such information, and that others cannot gain access to this information. Periodically test your security system to ensure that personal information remains secure.
4. Employment application forms should seek only necessary information to properly evaluate the employee. Questions on the form (or asked in hiring interviews) should not contravene the *Human Rights Code*, *ESA*, or other applicable legislation.
5. Employees and applicants for employment should be asked to provide written consent with respect to the collection, use and disclosure as necessary of their personal information in certain circumstances.
6. Develop an internal complaint mechanism for employees (or others) aggrieved by the company’s actions with respect to the maintenance of private information. If employees or others believe they have a viable internal ombudsman or complaints process, this can save the organization from having a third party investigate such complaints.
7. A suitable individual should be appointed as responsible for administering all privacy-related policies. Usually, the head of human resources, or finance, or the chief legal officer would be the individual where the privacy buck stops.



## IV

### **WORK PLACE VIOLENCE –VERY DANGEROUS**

A company in a Toronto suburb recently had a disgruntled former independent contractor come on company premises with a loaded gun. The individual opened fire, killing the General Manager and seriously wounding two other employees whom were in the General Manager's office at the time.

"Going Postal", alas, has happened in Canada previously. An incident several years ago involving a disgruntled employee of the Ottawa Public Transit Commission also involved workplace deaths.

I wish I could provide advice that would be a "magic panacea" to all my valued clients and contacts to keep you safe and prevent such incidents from ever occurring. Unfortunately, there is no such magic formula. Some steps may well be worth reviewing, however, along with other safety surveys, to contain or minimize the damage from such violence.

Indeed, *The Occupational Health and Safety Act* of Ontario mandates employers to provide a safe workplace. Thus, employers should be duly diligent regarding all areas of workplace safety, including demonstrating due diligence and taking steps to prevent or minimize workplace violence.

#### **The following suggestions may assist:**

1. Control access to plant and office locations. Only those individuals who have authorization to be on premises should be able to get beyond security or, in the office environment, the receptionist. Use of pass cards and badges will ensure that only those current employees or visitors who sign-in can gain access to your work location.

Pass cards should also be used to open security doors. For example, in the recent Toronto case, if access had been controlled, this may have prevented the accused from gaining access to the General Manager's office where the shooting took place.

2. Review your security and alarm system. Panic buttons should be installed at appropriate access points or other locations where, for health and safety reasons, it would be prudent to have them. Employees should be trained in their use. If the receptionist or other individuals who act as your "gate keepers" have any concerns, then they should be instructed to push the button first, and ask questions later. They should also be assured that caution is the best policy in such cases, and that they should not hesitate to sound the alarm if faced with a life-threatening situation. In the event that someone bent on mayhem or destruction gains access, the early summoning of police and medical assistance could mean the difference between life and death.
3. Review your workplace harassment policy. It should clearly indicate that violence in the workplace is not tolerated. All managers and supervisors should be trained and sensitized to the issue of workplace harassment and violence. At the first sign of trouble management must react appropriately and take such action as is advisable regarding an offender. Weed out the bad apples early, not only for morale issues but also to hopefully avoid an escalation of violence.

4. When dismissing an individual for any reason, ensure that that individual no longer has access to your premises. An “exiting employee checklist” should include the surrender of pass cards or keys to the premises. A former employee has no “special status” and must follow all the normal visitors procedures that exist. If a former employee has previously demonstrated violent tendencies or has made any threats to any fellow employee or member of management, then that individual must not only be barred from the premises, but police involvement should be considered. Before the disgruntled employee formulates a plan for violence, it may be possible to nip that in the bud with an early visit from the police, or by some other form of warning.
5. When reviewing your employee relations policies, consider designating one individual to whom employees can confide in the event they have difficulty with their own manager. Usually that is the head of human resources or some other senior manager. That individual could function as a “safety valve” as well as an “early warning system” in the event that there are problems bubbling below the surface. All managers, however, as indicated above, must be sensitized and vigilant for these types of occurrences.

If all of the above items are followed, will that guarantee an end to workplace violence? As indicated at the outset, I wish that were so! Yet, pro-active and reasonable steps to try and avoid or minimize the consequences from such deadly situations should still be initiated.



**A “GET- TOUGH” POLICY PRECEDENT—extreme caution urged!**

*I recently found the following Employee Relations Policy in my discard pile. It was used by a client that kept me very busy resisting an application for union certification, then on many labour arbitration cases as well as civil actions and Human Rights matters. Ultimately, the corporation sank into bankruptcy. Per chance, this policy had something to do with it? You be the Judge!*

**“Employee Relations Henceforth...”**

**DRESS CODE:**

It is advised that you come to work dressed according to your salary. If we see you wearing \$350 Prada sneakers and carrying a \$600 Gucci bag, we assume you are doing well financially and therefore you do not need a raise.

**SICK DAYS:**

We will no longer accept a doctor’s statement as proof of sickness. If you are able to go to the doctor, you are able to come to work. Besides, we can’t read their writing, anyway.

**SURGERY:**

Operations are now banned. As long as you are an employee here, you need all your organs. You should not consider removing anything. We hired you intact. To have something removed constitutes a breach of employment.

**PERSONAL DAYS:**

Each employee will receive 104 personal days a year. They are called ‘Saturday and Sunday’.

**VACATION DAYS:**

All employees will take their vacation at the same time every year. The vacation days are as follows: Jan 1, July 1 or 4, and December 25.

**BEREAVEMENT LEAVE:**

This is no excuse for missing work. There is nothing you can do for dead friends, relatives or co-workers. Every effort should be made to have non-employees attend to the arrangements. In rare cases where employee involvement is necessary, the funeral should be scheduled in the late afternoon. We will be glad to allow you to work through your lunch hour and subsequently leave one hour early, provided your share of the work is done enough.

**OUT FROM YOUR OWN DEATH:**

This will be accepted as an excuse. However, we require at least two weeks notice as it is your duty to train your own replacement.

**RESTROOM USE:**

Entirely too much time is being spent in the restroom. In the future, we will allow the practice of going in alphabetical order. For instance, all employees whose names begin with ‘A’ will go from 8 to 8:20, employees whose names begin with ‘B’ will go from 8:20 to 8:40 and so on. If you’re unable to go at your allotted time, it will be necessary to wait until the next day when your turn comes again. In extreme emergencies employees may swap their time with a co-worker. Both employees’ supervisors *in writing* must approve this exchange.

**LUNCH BREAK:**

Skinny people get an hour for lunch as they need to eat more so that they can look healthy, normal size people get 30 minutes for lunch to get a balance meal to maintain their average figure. Fat people get 5 minutes for lunch because that’s all the time needed to drink a Slim Fast and take a diet pill.

Thank you for your loyalty to our company. We are here to provide a “*positive employment experience.*”



**DID YOU KNOW?**

- ② that Ricketts, Harris is a full service “boutique” law firm located in downtown Toronto. With fixed operating costs, the firm offers first class legal service for reasonable fees.
- ② in addition to servicing business needs, the firm also offers personal legal services, including wills, estates and family law assistance.
- ② in addition to my interest in employment law, I also offer civil and commercial litigation services. Other members of the Ricketts, Harris team are also available for advocacy services before all courts and tribunals.

Well, now you know...for information or assistance regarding your legal needs, please contact Jay Josefo at (416) 364-6211 Ext. 244. E-mail address: [jj@rickettsharris.com](mailto:jj@rickettsharris.com).

