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SUMMER 2023 VOLUME 21, No. 3



Nathaly Pinchuk  
RPR, CMP  
Executive Director

# AI: Can You Trust a Machine with Your Human Resources?

*Maximize its benefits*

Artificial Intelligence (AI) is reaching into all areas of HR and few of us have been untouched by its invisible hand. As it expands, it is also making many managers nervous. Can we trust AI in the same way that we would a HR expert? The simple answer is no. This doesn't mean that AI cannot assist any manager and HR department with some of their tasks.

The main benefits of AI are in helping us to automate repetitive tasks so that we have more time for our important strategic work. It can help reduce errors since no humans are involved. That also reduces the possibility of introducing our own biases and lets data rather than our personal views drive decision-making.

On the downside, AI costs money, both in software and training to operate and maintain automated systems. The biggest drawback may be that AI cannot translate things like corporate culture and a computer really has no ethics. It only adds and subtracts. Also, AI can only give you back what you put in and make decisions based on the parameters you provide. There's really no value-added.

Let's dig a bit deeper. Here are some pros and cons when it comes to utilizing artificial intelligence in 3 key areas of HR: Staffing, Employee Engagement and Learning and Development.

### Staffing

Staffing and recruitment are likely the most popular areas to utilize AI. It helps in sorting, screening and shortlisting qualified applicants for positions. It can also help with searching for specific qualifications or experience, checking social media activity and reference checks once you've made a decision to hire.

Although AI has none of our human bias, it cannot differentiate based on anything related

to values or corporate culture. Another possible flaw is that artificial intelligence actually learns from us so it can pick up on our preferences for certain traits and eliminate some good candidates who don't have what it thinks we want.

### Employee Engagement

We all want to improve employee engagement. Happier, more involved employees are more loyal and productive. AI can help automate some ways to measure employee satisfaction like surveys and feedback loops. It can even be programmed to give employees a virtual interface in real time where they can ask questions and provide feedback and suggestions to management.

Skeptics of AI believe that using it for employee engagement is over-rated. It may actually hurt employee morale if employees feel that their well-being is being transferred over to a machine. Automated systems may not have enough to deal with individual employees' needs in this area. A "one size fits all" approach using AI may not work. Also, not everyone likes chat-bots.

### Learning and Staff Development

Developing staff is a major responsibility for both managers and HR. AI can certainly help here. E-learning programs are now available for all aspects of development including onboard-

ing and orientation all the way to career management and leadership training. Training can be done faster, more efficiently and in multiple locations. An artificially intelligent tracking system can also monitor progress and help evaluate employee performance with recommendations on training as required.

However, not everyone learns the same way and some employees struggle to learn online. Others miss the personal touch and coaching that comes in real-time learning situations as well as the opportunity to learn with and from others in the same program. There's also a question of employee privacy that gets people nervous about AI in this area. AI is gathering intelligence on employees and on their work habits, preferences and performance.

### What's the Bottom Line on AI for HR?

There are definitely some clear advantages. Anything that saves time is a good thing. Keep in mind that it does come with a catch. It is still a machine and no matter how smart they are, computers will never replace people. Think about 'smart' cars. There may eventually be driverless cars on the roads, but they will still need a human to give them directions.

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

Perspective

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Brian W. Pascal  
RPR, CMP, RPT  
President

President's Message

# Is it Time to Go Yet?

Questions to ask before you retire

Many employees spend years dreaming about retirement, only to end up feeling daunted by the prospect when it finally arrives. Sure, you love your job and have enjoyed making meaningful contributions over the course of your career, but you also have big plans for all the free time that a blank slate will offer—right?

The thing about retirement is that it's one of those things that we think about a lot but need to talk about more. Unfortunately, no one teaches you how to do it. Also, deciding if it's the right time can be pretty overwhelming. That said, many people have experienced this dilemma, so there is a lot of tried and tested advice to rely on when making the leap.

Here are a few questions to consider before making the call.

### What's the Grand Plan?

Exiting the workforce will seriously impact every area of your life, so it's crucial to have a plan in place to help you make the transition. Are you planning to buy a cottage or a boat, spend your days on the golf course or travel the world? Whatever the case may be, you should have a goal in mind. As you determine what your dream is, the next questions can help you determine whether or not you're ready to make it happen.

### Do I have the funds needed for the retirement I want?

It's an obvious question, but it requires careful consideration. It's wonderful to have a set of goals, dreams and ambitions for your retirement—but frankly, they don't mean a thing if you lack the financial means to fulfil them. Be realistic about the kind of lifestyle you want to lead in retirement and get a solid estimate of what your future expenses will be. Once you have some concrete figures in mind, you can better assess whether you will have enough money to live comfortably and actually enjoy your retirement years.

### Am I missing out on important benefits if I retire now?

In some cases, opting to work a bit longer can dramatically improve your chances of retirement success. So, before you decide if now is the right time, ensure you aren't missing out on any potentially significant earnings. Things to consider include your workplace benefits and pension calculations and how much your retirement income would increase if you delayed it by a few years. Also, are your savings funds being matched by your employer? Don't forget to factor in all the little details that contribute to your potential to save.

Once you are comfortable in answering these questions, you may truly be ready for the cottage or the golf course. Fore!

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



"I, along with some of the other employees, feel you're abusing the break room."

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Feature

# Discretionary Bonuses

*Employers must always exercise fair and reasonable discretion*

## **Introduction**

In late 2022, the Ontario Court of Appeal reminded employers that the terms and conditions in an employment contract must be carried out in a fair and reasonable manner, even when the employer is explicitly granted discretionary powers. In *Bowen v JC Clark Ltd*, 2022 ONSC 614, the Court found that discretionary bonuses must be granted fairly and reasonably, despite the wording in the employment agreement.

## **Background**

In *Bowen*, two hedge fund portfolio managers were terminated on a without-cause basis. At termination, the employer provided two weeks' salary in lieu of notice, in addition to a \$577 "2-week pro rata bonus." The portfolio managers sued the employer for \$1.3 million, claiming: (1) they were implicitly entitled to performance fees under their employment contract; and (2) they were entitled to a significant bonus for the portion of the 2014 year in which they were employed.

The discretionary bonus provision provided the following:

At the total discretion of the Company, you may be eligible for a bonus at the end of each fiscal year depending on factors that include your personal performance and the profitability of the Company.

At the trial level, the Ontario Superior Court of Justice declined to consider the discretionary bonus issue, finding that the claim was insufficiently pleaded. In addition, the trial judge found that they were not entitled to performance fees.

## **The Decision**

On appeal, the Ontario Court of Appeal agreed that the employees were not entitled to performance fees. However, the Court overturned the trial judge's finding that the bonus issue was incorrectly pleaded, and fully considered the issue itself.

In the context of a discretionary bonus clause, the Court held that there is an implicit contractual term to exercise that discretion in a fair and reasonable manner. Despite the wording of the contract, the employer is not "entirely unconstrained."

The employer testified that the bonuses were always awarded entirely subjectively. The employer considers many factors, including corporate

performance, individual performance, attitude, teamwork, fund performance, asset-raising and marketing. While the Court acknowledged this subjectivity, it held that any evidence demonstrating "unconstrained discretion" was inconsistent with the employer's duty to grant the bonuses fairly.

The Court looked to similarly situated employees in order to determine whether the bonus was fair. It looked at similar employees whose funds did not perform as well as those managed by the terminated employees. The employer gave these similarly-situated employees about \$200,000 in discretionary bonuses in 2014. Given these numbers, the Court found that there was a "significant bonus pool" in 2014.

The employer stated that there were significant concerns about the terminated employees' attitude and teamwork, and it believed that the employees were planning on leaving the company to start a competing business. However, the Court rejected this justification, pointing out that the employees were terminated on a without-cause basis. Rather than focusing on subjective criteria, the Court emphasized that the return on the funds was one of the best pieces of objective evidence regarding what constitutes a fair and reasonable bonus.

## **The Outcome**

In the end, the Ontario Court of Appeal found that the \$577 "2-week pro-rata bonus" was not a fair exercise of the employer's discretion. The employees were entitled to a bonus in the amount of \$115,000 each, which reflected the bonus received by similarly situated employees in 2014, pro-rated until the date of termination.

## **Takeaways for Employers**

The decision in *Bowen* is consistent with recent Supreme Court of Canada jurisprudence recognizing the duty of good faith as a fundamental principle of contractual interpretation (see e.g., *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7). While the duty of good faith does not remove discretion entirely, it places limits on *how* a party can exercise that discretion. For example, it cannot exercise discretion in a way that is ulterior or extraneous to the purpose for which it was given. In *Bowen*, while the Court never explicitly referred to the duty of

*continued on page 6*



**Philip Gennis**  
J.D., CIRP

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Feature

# What's Up? Insolvencies

*Watch for the early warning signs*

The Office of the Superintendent of Bankruptcy reported that the number of insolvencies filed by Canadian companies in 2022 was up 37.2 per cent compared with 2021 and the problem is getting worse, not better. Here are some raw and sobering numbers:

- In 2022, there were 3,402 business insolvencies, up from 2,480 in 2021
- Business bankruptcies totalled 2,621 in 2022, up from 1,942
- Debt settlement proposals filed by businesses amounted to 781, up from 538 in 2021.

## What's driving this?

Only about half of small and medium-sized businesses, according to the Canadian Federation of Independent Business (CFIB), have seen their sales return to pre-pandemic levels. For those who have seen a return to more regular business levels, they are struggling with high inflation, higher interest rates, labour shortages and supply chain challenges.

Many businesses borrowed money from a variety of sources during the pandemic. That included readily available cash from the federal government through the Canada Emergency Business Account. While most of those loans were interest-free, now they have to be repaid and many businesses of all sizes are having trouble keeping up with those payments.

There has been a little relief and some breathing room created when the repayment deadline was moved to Dec. 31, 2023. Even with the extension, many organizations still won't be able to increase their sales enough to meet that deadline. Many like the CFIB are pushing for another extension which could come as welcome relief to struggling enterprises.

## What's next?

According to the Office of the Superintendent of Bankruptcy, the companies most at risk are in the accommodations, construction and food services industries. This is not surprising given the downturn in the travel and tourism industries during long periods of lockdowns and limited openings.

It may get worse before it gets better. The Chair of the Canadian Association of Insolvency and Restructuring Professionals, Jean-Daniel Breton, said in a statement that "We expect to see additional pressure on debtors and a subsequent increase

in the number of business insolvencies as higher borrowing and input costs impact businesses still struggling to recover from the pandemic."

In one note of optimism, Mr. Breton said that the increase in insolvency filings wasn't necessarily a bad thing. Sometimes this meant that businesses were reorganizing themselves to prepare for the future. This is a proactive measure that means these companies are taking proactive measures to put themselves on a more stable financial footing.

On a more hands-on level, there are a number of things which owner-operated businesses should know. The first thing that any business should do is recognize the warning signs of business distress long before there are discussions of insolvency or bankruptcy. If you know the speed bumps that lie ahead, you may be able to avoid some of them. Others may be unavoidable, like a recession or market collapse or heaven forbid another world-wide pandemic. If you know the risks and plan for them, you have a much better chance of landing your business on the right side of the ledger once the danger passes.

Here are some early warning signs that you should pay attention to. They should be reviewed and analysed periodically so that you know the true health of your business and the risks on the road ahead.

- Borrowing is extended to the limits negotiated with bankers;
- Major discrepancies exist between internally prepared and audited financial statements;
- Persistent operating losses;
- Significant variances between actual and projected results;
- Excessive build-up of receivables and/or inventory, both of which are turning over more slowly from year to year as compared against industry standards;
- Build-up of trade payables and government liabilities;
- Lack of useful and timely financial information;
- Lack of budgeting and cash flow projection;
- Unrealistic annual projections and cash flow forecasting;

*continued next page...*

## What's Up? Insolvencies - *Watch for the early warning signs*

... concluded from page 5

- Lack of meaningful follow-up on negative variances from budget;
- Overambitious expansion and/or acquisitions;
- Inadequate capitalization;
- Problems with technology;
- High concentration of sales to a small number of customers;
- High fixed costs in a business with unpredictable results;
- Increase in competition;
- Little, if any, delegation of authority;
- Aging ownership without an established succession plan;
- Lack of a clear business plan;
- Turnover of key personnel.

Having some or all of these indicators does not mean you're in trouble-yet. But they are signposts that suggest your business is in trouble, at least by some measurements. They should all be treated seriously and with urgency if you don't want to find yourself in much hotter water.

Peter Drucker, the business and management guru, once said: "Trying to predict the future is like trying to drive down a country road at night with no lights while looking out the back window." That is true, but it is easy to predict where we're going if we pay attention to the signs along the way.

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## Discretionary Bonuses

*Employers must always exercise fair and reasonable discretion*

... concluded from page 4

good faith, the result was the same. Employers should exercise discretion carefully in all cases, not just discretionary bonuses.

Employers should also take note of the distinction the Court made between subjective and objective justifications for a bonus. It may be common practice for employers to consider subjective factors such as teamwork and attitude when awarding a bonus, especially in the case of a tension-fraught

termination. However, the Court will not necessarily accept these factors when an employee is dismissed without cause, and employers must act fairly at all times.

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**Tom Ross**  
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Feature

# New Tort of Harassment

*Alberta employers beware*

A recent decision from the Court of King's Bench of Alberta has established the tort of harassment in Alberta.

In the decision *Alberta Health Services v Johnston*, the Court found Kevin Johnston, an online talk show host and candidate in Calgary's mayoral election, had defamed and harassed an Alberta Health Services (AHS) public health inspector. Among other things, Mr. Johnston alleged the public health inspector was a "terrorist" and a "horrible human being" due to her involvement in the implementation of public health measures related to COVID-19. He also threatened to use his mayoral powers to send her to prison if he won the election.

The judge awarded the public health inspector a total of \$650,000 in general and aggravated damages, including \$100,000 as damages for the novel tort of harassment. The decision also granted an injunction preventing Mr. Johnston from "[harassing] AHS employees, [including public health inspectors], as they carry out their duties and in their private lives."

Prior to this decision, there was no formally recognized tort of harassment in Alberta, even though harassment claims can arise under the Alberta Human Rights Act, the Occupational Health and Safety Act, the Workers' Compensation Act and the Criminal Code. Courts had previously found that there is no specific civil action for harassment (known as a "tort") and have required that such claims proceed to statutory bodies like the Human Rights Commission.

In a lengthy decision, the Court set out its reasoning for the departure from this precedent. The judge explained that courts have the power to recognize new torts in order to "keep the law aligned

with the evolution of society" and where "the harm in question cannot be adequately addressed by recognized torts." The Court then analyzed existing torts, such as defamation, invasion of privacy and assault, and found none of them completely addressed the case at bar.

Interestingly, the Court also noted that "harassment is something that can happen to anyone, but disproportionately affects women and members of other marginalized groups." Quoting scholar Joanne Conaghan, the Court argued that "the common law is, by tradition, insensitive to the particular wrongs suffered by women," but that this can and ought to change. By creating a civil remedy for harassment, the AHS decision will make it easier for women and other marginalized groups to receive compensation when they have experienced harassment.

According to the decision, a defendant has committed the tort of harassment when that person has:

1. engaged in repeated communications, threats, insults, stalking or other harassing behaviour in person or through other means;
2. that the defendant knew or ought to have known was unwelcome;
3. which impugn the dignity of the plaintiff, would cause a reasonable person to fear for one's safety or the safety of loved ones, or could foreseeably cause emotional distress;
4. caused harm.

The decision further clarified that "the law cannot provide a bright line between what is harassing and is not harassing behaviour," and the distinction "must be determined on a case-by-case basis." This distinction will likely be clarified by the courts as more litigation using the new cause of action takes place.

Although the AHS decision comes from the Court of King's Bench and the Court of Appeal of Alberta could still overturn it, it has the potential to set an important precedent. The Court of Appeal of Ontario has previously declined to recognize a tort of harassment (see *Merrifield v Canada (Attorney General)*), arguing that existing cases "are not authority for recognizing the existence of a tort of harassment in Ontario, [and] still less for establishing either a new tort or its requisite elements."

This means there is now a significant discrepancy between the state of the law in Alberta and Ontario. Given the importance of the issue, and its variable treatment by provincial courts, it seems likely that the Alberta Court of Appeal or other appellate level courts will eventually weigh in on the matter. Until then, however, the tort of harassment is a valid cause of action in the province of Alberta and may give rise to new claims against employers.

The decision also highlights the fact that "judicial development of a tort of harassment does not prevent the Legislature from occupying the field." This means the Legislature could choose to override or confirm the AHS decision by modifying the common law tort, making it unactionable, or creating a new statutory cause of action for harassment.

It will be interesting to see how this concept develops and what implications it may have for employers.

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# Facilitation Tips for Managers

Review this checklist for success



Gail Boone  
MPA, CEC

Next Stage Equine  
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Feature

**Understand who you are as a facilitator.** Think about your values, beliefs and assumptions at play when facilitating. How do these influence your style? Understand your preferences for process, group size and structure and think about how these might affect people in your audience.

**Consult Diversity, Equity and Inclusion Advisors and Adult Education Design Experts.** Seek help to learn how your style and preferences might affect participation. Where are your blind spots? What professional development could you participate in to grow new knowledge, skill and facilitation ability?

**Identify your favourite 'go-to' tools and discover how they help or hinder individual participation.** Facilitators need various methods and tools to ensure that all voices get heard. Conduct an inventory of your tool kit and identify the ones you reach for the most. Review evaluation forms for clues as to what participants preferred. Learn new tools that support participants' processing and learning styles.

**Learn about participant preferences.** Before facilitating, find out about the ways participants process and learn. Ask about learning styles and preferences for tools that assist with individual participation. Make sure to ask inclusively so as not to single anyone out.

**Design the agenda to allow for variety.** According to the Cleveland Clinic, "Neurodiversity" is a word used to explain the unique ways people's brains work. While everyone's brain develops similarly, no two brains function just alike. Being neurodivergent means having a

brain that works differently from the average or "neurotypical" person. This may be differences in social preferences, ways of learning, ways of communicating and/or ways of perceiving the environment. Check out <https://my.clevelandclinic.org/health/symptoms/23154-neurodivergent>. Some individuals excel at communicating electronically. Allowing them to share in a group setting using technology facilitates participation and access to an individual's ideas that might otherwise be missed.

**Manage the logistics considering size, space, physical setup, technology, visual and other sensory needs.** Make sure the physical design is conducive to ease of participation. Allow for two or three different physical arrangements so participants can choose the best one for them. For example, maybe a U shape for sharing information with larger groups and round tables that allow for breakout and smaller group dialogue on the central questions. Ensure the equipment necessary for gathering electronic input is available.

**Consider various ways of soliciting input before the gathering.** Not everything needs to happen in the room on the day of the session. Once you understand the central questions to be addressed, offer individual interviews to gather input from people who prefer one-on-one contact. Use auditory or visual recordings to share information on what will be addressed, inviting participants to provide input in a way that supports their voices being heard. Allow people time to respond in writing. Don't depend on gathering all information in the room on the day of the gathering.

**Provide data in a variety of forms.** Rather than relying solely on print material, use a variety of ways to enable participants to access information relative to the topic being explored. If necessary, send this material before the meeting in sufficient time to be reviewed.

**Manage your expectations regarding participation.** Understand that some people prefer to work one-on-one or in small groups and are not comfortable being singled out or called upon. Whereas extroverts often thrive in social settings and can effectively manage larger groups, it can be draining for people who identify as introverts. Extroverts prefer to think out loud and mull it over, considering the ideas of many, whereas introverts generally prefer to process information by themselves before weighing in. It's essential to ensure ways to hear from introverts. Being quiet does not mean they do not have anything to offer.

**Evaluate your approach.** It's not over until you understand what participants thought of the opportunity. Design an evaluation form that will give comprehensive information about what worked well and what might need to be changed for next time.

No two people are alike, nor do we think alike. When the uniqueness of how we receive, process and work with information is welcomed and celebrated, the workplace benefits from the richness of everyone's ideas.

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# Worst Mistakes Made with a Letter of Offer



**Howard Levitt**  
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Senior Partner,  
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**Q** | *What have you found to be the five worst mistakes made with letters of offer?*

**A** |

**1) The letter of offer is provided after the parties already came to an agreement**

In the *Hobbs v TDI* case (in which I acted), this is exactly what happened. The parties made an agreement. Then the letter of offer (which the employer wished to rely upon) was sent and signed. The court noted that since the employee received nothing new in return for this new offer, it was totally unenforceable. Even if the original agreement was oral, if that oral agreement could be proved to the satisfaction of the Court, a later letter of offer is of no significance.

Letters of offer which employees see and sign on their first day of work are unenforceable because the employee would not have come to work if they had not already had a deal. Also, it might have been a deal very different from that letter of offer.

**2) The offer contains terms which are illegal**

My last column provided examples of what such illegal terms could be, but they are those same terms which would render an employment contract unenforceable.

**3) The employer is careless in drafting the offer**

Sometimes employers use standard form offers which are different from the actual discussions between the parties. Those new terms could come back to haunt the employer as the employee will insist that the accepted offer is actually their agreement, not what had been pre-negotiated. If the

employer can clearly show, preferably from written evidence, that the contract which they drafted is not what was agreed to, the court might set it aside based on the doctrine of rectification. Note that it is an uphill battle for any employer.

A good example is putting the wrong salary into the offer. I have seen too many cases where that occurred.

**4) Including any term in the offer which violates the human rights code**

This could be showing any preference or making requirements which disproportionately impact on disability, age, gender, etc. You should all be aware of this already as that has been HR's bugaboo for decades.

**5) Not having the employee agree to the letter of offer**

If an unequivocal offer is made and the employee commences employment on that basis, the employer has a good argument that the employer accepted the terms of that offer by commencing employment. However, the employee may claim that they never saw the letter or that they were relying upon other representations and agreed to the job on that basis. Make sure employees sign their letters of offer.

Employers often have employees execute elaborate contracts, but, at law, a letter of offer is a contract and suffices legally. As well, employees are often much less nervous and resistant to agreeing to a letter of offer than a more formal employment contract. Note that legally, it has the same impact. More employers should use a letter of offer instead of a contract.

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ASK the Expert



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ASK the EXPERT

# Innovative Recruiting: Finding What Works

*The continuing search for the right options*

**Q** | *What are organizations doing these days to improve the recruiting process?*

**A** | *Innovation seems to be an increasingly popular word and if you're not being innovative, exactly what have you been up to lately? If you were hoping that pesky 'I' word was going away, sorry. That won't happen anytime soon, particularly in management and Human Resources. One area that appears particularly targeted for innovation is the recruiting process.*

In some ways, talent acquisition is an easy place to innovate since things are always evolving. Everyone is looking for an advantage when it comes to recruiting and retaining the best and brightest talent. The way we recruit has changed because the way we communicate is drastically different from even a few years ago. If you want to reach potential recruits, you have to first find them. You find them by going where they are, usually on some social media network.

Innovative recruiting is not just about adopting the latest tool or technique because some of them will simply not work to get you the employees needed. It is also not following along with the crowd, even as we all start moving like a herd towards the newest social media trend. It is truly about finding the best technologies and strategies to help showcase your organization to the world, so that candidates will start thinking about you long before you start to actively seek them out.

Here are some ways that organizations are doing just that.

### **Going Undercover**

Some companies are using a little espionage to gain insight into candidate skills and abilities that they may not be able to get out of just the interview process. This includes some American banks that send their recruiters out to other job sites to see how prospective candidates operate in their current occupations. This is particularly effective for positions like loan officers and others who have to deal with the public. They can see how the candidates perform in real life so that they get some insight about their possible performance and potential later on.

### **Employee Referrals**

Employee referrals have long been a popular way for employers to lure good candidates to their organization. If an employee offers a good word about the company, their friends and contacts are much more likely to come on board as well, and to stay with the organization for the long term. The inno-

vation in employee referrals includes social media referrals and additional incentives for employees to pass along good words about the company in their Twitter and Facebook postings. Some companies even run full in-house training and advertising campaigns to let employees know about the benefits of employee referrals and encourage them to become recruiters for the organization as part of their job. Your employees are your best ambassadors. Why wouldn't you give them the proper training to represent you to their world?

### **Find Them Where They Are**

It has always been fair in love, war and the recruiting process to try and recruit people from the other side. This has led some companies to come up with imaginative ways to lure top talent from their competitors. One food service company did some research on their competition and found out where many of the staff from that company went for lunch and after work for drinks. Then they had coasters and napkins printed up with the name of their company on them and paid the bar and restaurant to stock them for a few weeks. They followed this up with direct contacts and were able to recruit several key employees over to their side.

### **Innovative Marketing**

Start-up companies and others that need to find employees in a hurry often speed up their recruitment process by innovative or flash marketing. They find public ways to advertise their companies targeting mass transit like bus shelters in an area where some potential recruits may already be working. They then supplement this by social media buys like Twitter Blasts or ads on Instagram. Others combine a recruiting campaign with a branding exercise if they want to update or refresh their brand name in the marketplace. They see no lines between the company they want the public to see and the organization that employees would like to work for.

### **Identifying Hidden Candidates**

After all normal recruiting measures and methods fall short, many turn to innovation as a necessity. This could include trying to find the hidden candidates that may be deep beneath the surface or right under their noses. One very interesting approach was taken by Google who has having trouble recruiting enough computer engineers. They actually put up a billboard with a complex puzzle to solve. Only those like qualified computer engineers would be able to solve that puzzle. When someone did, they unlocked a code to a secret website link that led them straight into the Google recruiters.

In order to not only survive but thrive in this most competitive marketplace, you must stay well ahead of the pack.

# 2023: Time to Update Labour Law?

## *Changes and Potential Changes to the Canada Labour Code*



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Feature

Federally regulated employers are seeing changes to employment and labour legislation in 2023 with the possibility of more to come with additional potential amendments to the Canada Labour Code, RSC, 1985, C L-2 (the “Code”).

Proposed changes to regulations could also result in a number of potential changes to federal employment standards. Some of the proposed changes include specific provisions relating to reimbursement of work-related expenses and employee information. These proposed changes would require employers to reimburse employees for reasonable, work-related expenses within thirty days of the submission of a claim for payment.

What would qualify as “work-related” would depend on whether:

- the expense is connected to the employee’s performance of work;
- the expense enables an employee to perform work;
- the expense is required by the employer as a condition of employment or continued employment;
- the expense satisfies a requirement for the employee’s work imposed by an occupational health and safety standard; and
- the expense was incurred for a legitimate business purpose and not personal use or enjoyment.

What would qualify as “reasonable” would depend on whether:

- the expense is connected to the employee’s performance of work;
- the expense enables an employee to perform work;
- the expense was incurred at the request of the employer;

- an amount was incurred beyond the amount necessary to enable the performance of work;
- the expense is one that is normally reimbursed by employers in similar industries;
- the expense was authorized in advance;
- the expense was incurred in good faith; and
- the claim for reimbursement includes documentation, such as a receipt or invoice.

Other proposed regulatory changes would require employers to provide employees with a written statement containing information about their employment within thirty days of hiring, as well as copies of any updates. The written statement would include:

- the names of the parties to the employment relationship;
- the job title and description of duties and responsibilities;
- the place of work;
- the date of commencement of employment;
- the term of employment;
- the probationary period, if any;
- the specific requirements of employment e.g. driver’s license, criminal record check;
- the required training;
- the employee’s hours of work, how hours are calculated, and overtime rules;
- the rate of wages or salary, including overtime rates;
- the frequency of payment;
- any mandatory deductions; and
- information regarding reimbursement of work-related expenses.

Additional proposed regulatory changes could allow service of documents to be affected by courier, fax or other electronic means; provide clarity on how wages are calculated for em-

ployees paid for time spent at Canada Industrial Relations Board proceedings; and increase the minimum age of employment for hazardous occupations from 17 to 18 years.

This year could also bring major changes to labour relations for unionized, federally regulated workplaces. A private member’s bill has been introduced that would ban the use of replacement workers, as well as new employees, contractors, existing non-bargaining unit employees, and employees from other locations during strikes and lock-outs. The proposed bill would also give the Canada Industrial Relations Board cease and desist powers and the ability to fine employers \$10,000 per day for violations. Whether a private member’s bill like this one with the potential for sweeping changes to the labour relations regime and significant impact on employers will make any headway is yet to be determined but one worth watching.

Changes and potential changes to legislation, at both the federal and provincial levels arise all the time. Some proposed changes have the traction and support needed to become law with real-life impacts on workplaces, while others die on the floors of legislatures. Regardless, employers should keep up with the latest proposed changes so that they can advocate and ensure compliance with any changes impacting their workplace.

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# Becoming Flu-ent in Human Rights

*Disability requires persistence*



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Under human rights legislation, employers cannot discriminate against an employee because of their disability. Specifically in Alberta, under the *Alberta Human Rights Act* (the “Act”), no employer shall (a) refuse to employ or refuse to continue to employ any person, or (b) discriminate against any person with regard to employment or any term or condition of employment, because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.

Under the Act, “physical disability” means any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a guide dog, service dog, wheelchair or other remedial appliance or device.

However, despite this definition of “physical disability”, it is not always easy to determine whether an illness or injury is considered a “physical disability” under the Act.

## **Temporary Injuries do not Belong with Disability?**

In *Masters v. Willow Butte Cattle Co.*, 2002 CanLII 78200 (AB HRC), the Alberta Human Rights Panel assessed the definition of “physical disability” under the Act at the time, which was substantially similar to the current definition. The Panel concluded,

“In this definition, there is no requirement that a person suffer from a severe or prolonged disability of any indefinite duration. It states any degree of physical disability caused, in this case, by an illness”.

However, *Masters* appears to be the outlier. The British Columbia Council of Human Rights established in *Nahal v. Globe Foundry Ltd.*, 1993 CanLII 16468 (BC HRT) that “The condition must entail a certain measure of severity, permanence and persistence”. For example, common ailments that are temporary in nature, including the flu, gastroenteritis, sinusitis, and strep throat, have previously been found not to be a “disability” for the purposes of human rights legislation. See *Ouimette v. Lily Cups Ltd.*, 1990 CanLII 12497 (ON HRT), *Burgess v. College of Massage Therapists of Ontario*, 2013 HRTO 1960, and *Valmassoi v. Canadian Electro-coating Inc.*, 2014 HRTO 701.

This “severity, permanence and persistence” test has been followed in Alberta. Recently, in *Smith v. Lafarge Canada Inc.*, 2021 AHRC 68, the Commission stated that, “While it is the case that a disability need not be permanent to meet the threshold, it must be more than a common ailment that lasts longer than a few days.”

As a result, in *Chodkiewicz v Chief of Police of the Edmonton Police Service and Edmonton Police Association*, 2021 AHRC 131, the Commission found a sprained ankle to be a temporary injury, and that without more, it would generally not be viewed as a disability for the purposes of the Act.

## **Perception is Everything**

However, it is important to note that “perceived disability” is also

recognized as a disability by the Supreme Court of Canada in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27. This means, as the Alberta Court of Queen’s Bench in *Synchrude Canada Ltd v. Saunders*, 2015 ABQB 237 stated, “[...] if Saunders was terminated or otherwise disadvantaged at work because Synchrude perceived him to be disabled, even though he is not, Saunders’ rights may have been violated.”

Furthermore, an employer also has a duty to inquire. If an employer is reasonably aware that there may be a disability requiring accommodation, it cannot ignore that fact and must inquire whether the employee suffers from a disability that requires accommodation.

## **Employer Takeaways**

Although not all illnesses or injuries will be found to be a physical disability as defined by the Act, because of potential allegations of “perceived disability” and the employer’s duty to inquire, if the employer suspects the employee suffers from a medical condition, even if it may not meet the “severity, permanence and persistence” threshold, the employer should initiate the accommodation discussion rather than take steps that may adversely impact the employee.

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# What you Need to Become an Influencer

*It all starts from within*

**I**nfluencers can significantly impact their colleagues by sharing their knowledge and recommendations regarding workplace activities. By becoming an influencer, you may see benefits for your profession and network, but achieving influencer status requires establishing yourself as a known authority or expert within your area of proficiency.

What is an influencer? An influencer is a person who has a high level of acceptance or expertise within their workplace. They often obtain their following because they have substantial experience, success or expertise in a particular field. Influential people stand out by easily taking attention. They can convince others to agree with them and gain respect from others around them.

Others in the workplace may look to you for your opinions, knowledge and even advice. Some organizations may establish partnerships with influencers hoping that their clients will be influenced to purchase the companies' services or products.

An influencer does not necessarily need to be known on a large scale.

There are many types of influencers, but this article will focus on how to be an influencer at work.

To be an influencer at work, you need to:

- Let others speak but have an opinion yourself
- Check your intentions
- Show tact and be consistent
- Make others feel included
- Encourage contributions, provide recognition and engage your audience
- Constantly build relationships and your network

Influential people stand out by quickly capturing attention. They

can sway others to side with them and gain respect from others.

A strategy for gaining power and influence is to build those connections. Listening first before you have an opinion to share will make others feel heard and acknowledged. Check your body language and tone to ensure you are projecting what you intend to show. Be consistent in your manner. Make yourself essential in meeting organizational goals by being trustworthy and reliable. Be assertive, not forceful and always be open to other ideas from your employees. Be true to who you are. Be authentic, transparent and open with your colleagues. Employees appreciate some vulnerability and genuineness in others. Be flexible and always follow through on what you say you will do. Actions speak louder than words. Do not just express your opinions, follow through.

To be that leader in the workplace with followers and respect, you need to provide opportunities for wins. Always believe in your employees. Being known as someone who serves others before serving yourself dramatically impacts how others see you. By giving trust, you can earn that trust back. Assign more significance to others, even more than they think of themselves. Truly connect with people and invest in the success of others.

Ways that you can influence others in the workplace could include: getting people to accept change; encouraging an individual to change behaviour or actions; getting a project approved; getting an idea or recommendation accepted and convincing someone to see things your way and reaching an agreement.

Why are influencers necessary in a workplace? On any workplace team, you need a certain amount

of influence. Often it is people who are leaders that have the most influence. They are the ones that affect employee behaviour.

Some of the benefits of being an influencer at work are:

- They gain recognition in promotion or other rewards. Employees with influence stand out in a group.
- Their capability in working with a team improves. Leaders with influence help others in the group feel that they fit in. When everyone feels included, they work better together and are happier at work.
- Stronger relationships are developed with colleagues and supervisors. Influential leaders have more respect at work. This makes forming and maintaining relationships easier.

Part of influencing others is being willing to be there for them. Look for opportunities to do favours for your colleagues. Being generous when someone requests your viewpoint, words of reassurance or direction. Connect employees to resources, groups or leaders within the organization that might be able to assist them.

As an influencer, you should not close yourself off to criticism or take things too personally. Always be available. The more interactions you have with colleagues at work, the greater your range of influence will be.

Stay focused. Put down the phone and turn away from the computer screen. Pay attention to your surroundings.

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Feature



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Feature

# Building Trust in Stressful Times

*The cost of not doing it is devastating*

Leaders have been working hard over the last few years to address constant change and respond effectively to increased workplace stress. It's been a difficult task to build trust with employees in these erratic, unpredictable circumstances.

Trust is a firm belief in the reliability, truth, ability or strength of someone or something. It is a psychological state comprising the intention to accept vulnerability based upon positive expectations of the intentions or behaviour of another.

The need for trust arises from our interdependence with each other. Leaders depend on their employees to help obtain, or at least not to thwart, the outcomes they value (and vice versa). As these needs with employees are intertwined, we also must recognize that trust is very valuable in workplace interactions.

Communication is the fundamental tool for building trust. People who have an opportunity to safely explore negative events and build understanding can begin to rebuild trust. Trust implies mutual understanding between people; each person understands the values and needs of the other. Trust is the stepping stone to enable people to reach an agreement that meets both their needs or recognize that common goal.

People who successfully work together need to establish a common goal or identity. Nurturing a common identity creates a sense of unity that can further strengthen trust. Leaders work to keep employees engaged in talk and actions that build a sense of 'we' rather than 'me'. They can support employees to step back and see the bigger business problem and show that they have more commonalities than differences. Working toward the collective achievement of these bigger

business problems (goals) fosters a feeling of "one-ness" that can bring people together in a way that strengthens a shared identity and builds trust.

According to the Reina Trust & Betrayal Model, there are seven steps to building trust after difficult situations:

**1. Observe and acknowledge what has happened.**

People need to feel heard. Leaders who can paraphrase and help others acknowledge the impact of their actions in a safe environment can make a difference. Healing begins when everyone can acknowledge what has occurred, the effect on people and the resulting outcome.

**2. Allow feelings to surface.**

A leader focuses on providing a safe environment to give employees permission to express their concerns, issues and feelings in a constructive manner. Doing so helps people begin to let go of the negativity they are holding, freeing up that energy for strong working relationships and returning their focus to the future.

**3. Get support.** Building trust is hard work. People under stress or in the middle of a difficult situation cannot do it alone. They need support to fully understand what occurred and what actions are necessary to move through the healing process. It is through support that small steps begin to emerge for growth, innovation, shared responsibility and accountability. Ensure your employees have the support they need through an EAP or HR.

**4. Reframe the experience.**

Employees can reframe their experience by looking at the bigger picture, reflecting on circumstances, noticing the reasons for concern and exploring opportunities that the situation presents. Leaders can shift the focus from the past (what employees don't

want) to the future (what they do want). When reframing the experience, consider that while employees might not have control over what has occurred, they do have control over how they choose to respond.

**5. Take responsibility.** People take responsibility when they acknowledge their mistakes or oversights. Telling the truth, without justification and rationalization, demonstrates a person's trustworthiness and exposes vulnerability. Doing so as a leader makes it safe for others to expose their own vulnerability, seek support and take responsibility for their own behaviour.

**6. Forgive yourself and others.** Recognize that forgiveness is freedom and is the gift we give ourselves. Anger, bitterness and resentment deplete people's energy and interferes with relationships and performance. Forgiveness does not mean forgetting or accepting that the violation was OK. Leaders realize when someone has done wrong to them but can also forgive them.

**7. Let go and move on.** Leaders accept what is so. Acceptance is not condoning what was done, but experiencing the reality of what happened without denying, disowning or resenting it – facing the truth without blame.

While not easy, building trust is essential for those in leadership roles and for those seeking to build strong working relationships and employee connections. The cost of not doing so is too high to be ignored. Leaders can play an instrumental role in supporting people to heal from stress and past negative events, to rebuild and sustain trust and renew working relationships.

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