



GROSMAN, GROSMAN & GALE LLP
BARRISTERS & SOLICITORS

Workplace Law E-ssentials

Friday, April 01, 2011

Welcome to the Inaugural Grosman, Grosman & Gale LLP Workplace Law E-ssentials Newsletter!

A Good Client is a Well-Informed Client...

As part of our continuing effort to ensure just that, Grosman, Grosman & Gale LLP is very proud to present our inaugural Workplace Law E-ssentials Newsletter. Each quarter, Workplace Law E-ssentials will provide timely legal updates, information and interesting articles for not only human resources professionals, but for anyone whose duties may intersect with human resource issues.

Today's employers have more responsibilities, duties and obligations than ever before. Issues about discipline, human rights, labour relations, protecting confidentiality and terminating employment arise constantly. To manage them effectively, you need legal counsel you can trust and advisors who have up-to-date, specialized knowledge.

At Grosman, Grosman & Gale LLP, we're experts in employment and labour law. It's all we do.

Please feel free to forward this to any of your professional colleagues who may find this information to be of interest by clicking on the "Send this to a friend" link on the main page!

What to do when the "Schoolyard Bully" Graduates to the Workplace

by Jeff C. Hopkins

What is Workplace Bullying?

Bullying is usually seen as acts or verbal comments that could "mentally" hurt or isolate a person in the workplace. Sometimes, bullying can involve negative physical contact as well. Bullying usually involves repeated incidents or a pattern of behaviour that is intended to intimidate, offend, degrade or humiliate a particular person or group. It can also be described as the assertion of power through aggression. A common example of this type of bullying (or harassment) is the manager or supervisor who embarks on a calculated course of undermining or demeaning one of his or her direct reports.



Lawyer Profile - Jeff C. Hopkins

Jeff provides strategic advice and expertise in all aspects of labour, employment and human resources law, with a particular focus on wrongful dismissal litigation. He develops and implements employment and workplace policies, counsels and advises human resource professionals, executives, managers and supervisors in workplace due diligence, positive employee relations matters and best practices. Jeff also drafts and designs executive contracts related to duties and responsibilities, compensation, benefits and related conditions of employment. Jeff provides representation and advocacy at mediation, before the Ontario Superior Court of Justice, Ontario Court of Appeal and defends employers before the Ontario Human Rights Tribunal and various arbitrators.

Jeff frequently speaks at human resources conferences, and is a regular author and contributor to

Currently, there is little occupational health and safety legislation in Canada that specifically deals with bullying in the workplace. However, some jurisdictions, such as Ontario with the recently enacted Bill 168, have legislation on workplace violence in which bullying is included. That said, employers will always have a common law duty to protect its employees from risks at work. This duty can mean both physical and mental health.

While bullying is a form of aggression, the actions can be both obvious and subtle. The following is a non-exhaustive list of different forms of bullying. It is also important to remember that bullying is usually considered to be a pattern of behaviour where one or more incidents will help show that bullying is taking place:

Some examples include:

- Spreading malicious rumours, gossip or innuendo that is not true
- Excluding or isolating someone in the workplace, either work-related or even socially
- Intimidating a person
- Undermining or deliberately impeding a person's work
- Removing areas of responsibilities without cause
- Constantly changing work guidelines
- Withholding necessary information or purposing giving the wrong information
- Establishing impossible deadlines, which will set up the individual to fail
- Making jokes that are "obviously offensive" by spoken word or e-mail
- Assigning unreasonable duties or workload, which are unfavourable to one person
- Persistent criticism or unwarranted (underserved) punishment
- Blocking applications for training, leave or promotion

Not surprisingly, the issue or problem facing many HR managers is, the "fine line" between strong management and bullying. However, objective comments that are clearly intended to provide constructive feedback are not usually considered bullying, but rather are intended to assist the employee with their work.

If you are not sure an action or statement could be considered bullying, you can use the "reasonable person" test: would most people consider the action unacceptable?

What can an Employer do?

The most important component of any workplace prevention program is management commitment. Management commitment is best communicated in a written policy. Moreover, in Ontario, Bill 168 makes it a legislative requirement that an employer have a written violence and harassment policy, and clearly identify (and resolve!) potential acts or incidents of violence and harassment.

What are some General Tips for the Workplace?

the HR Professional and other various publications for human resources professionals. Jeff also contributes to Grosman, Grosman & Gale LLP's Employment Bulletin, published by Canada Law Book.

Jeff graduated with Distinction from the University of Toronto, Trinity College, specializing in International Relations, and from the University of Western Ontario, Faculty of Law. At Western, Jeff was a member of the Gale Moot Team.

Outside of work, Jeff enjoys throwing darts at maps and travelling to that location.

Lawyer Profile - R. Mark Fletcher

Mark regularly advises and provides litigation representation to both employers and executive employees in complex contractual disputes, wrongful dismissal and unjust dismissal advocacy, responding to human rights applications in defence of employers, together with strategic advice and advocacy in constitutional and administrative law matters arising in the employment law field. Mark has appeared in matters before the Ontario Superior Court of Justice, the Ontario

DO's

ENCOURAGE everyone at the workplace to act towards others in a respectful and professional manner.

HAVE a workplace policy in place that includes a reporting system.

EDUCATE everyone that bullying is a serious matter.

TRY TO WORK OUT solutions before the situation gets serious or "out of control"

EDUCATE everyone about what is considered bullying and whome they can to to for help.

TREAT all complaints seriously, and deal with complaints promptly and confidentially.

TRAIN supervisors and managers in how to deal with complaints and potential situations.

HAVE an impartial 3rd party help with the resolution, if necessary.

DON'TS

IGNORE any potential problems.

DELAY resolution. Act as soon as possible.

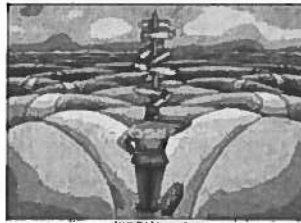
Regardless of the size of your organization, workplace conflict should be addressed swiftly, and fairly.

If this topic is of particular interest to you, or you are currently dealing with a workplace bullying or conflict problem, feel free to contact Jeff Hopkins or any one of Grosman, Grosman & Gale LLP's other lawyers.

The 'Just Cause' Crossroads

by R. Mark Fletcher

The business leaders will look to the HR professional for an array of guidance. Among other responsibilities, in most without cause termination scenarios, the HR professional is expected to estimate the severance package cost to the company, provide input on what benefits, if any, are to be continued within the severance arrangement offered to the employee, and how best to position and communicate the termination message to the dismissed employee and to his or her team. This can be a veritable mine field and is rarely ever



Court of Appeal, the Federal Court of Canada, the Federal Court of Appeal, the Canadian Human Rights Tribunal, and in *Canada Labour Code* unjust dismissal adjudications.

Mark also writes articles about employment law and regularly accepts invitations to speak at numerous human resource conferences; most recently he was a guest speaker for the Toronto Human Resource Professionals Association. Mark has also been a guest lecturer at The Law Society of Upper Canada's "Employment Law for the General Practitioner-Strategies and Best Practices" series in 2008 and 2009 and as a guest speaker at the Ontario Bar Association's 2010 "Fundamentals of Employment Law" conference. Mark's articles on employment law have appeared in publications such as the H.R. Professional and online for websites such as lawyers.com and jobexperts.com.

Mark graduated with distinction from McMaster University in 1998, where he received his B.A. (Hons) with a major in Political Science and a minor in International Justice and Human Rights. Mark attended law school at the University of Western Ontario, Faculty of Law, where he received his LL.B.

predictable. The stakes are often high and guidance from an employment lawyer throughout the termination process is key.

However, when the possibility for a 'just cause' termination arises, the legal risks and liability exposure to the business is significantly amplified and becomes more treacherous for the HR professional to navigate without close support from an expert employment lawyer. In this brief article, I attempt to highlight some key areas that should be identified and considered by the HR professional working in concert with an employment lawyer and the organization's internal business partners before proceeding with a 'just cause' termination:

- **The Employment Contract Solution.** Manage liability exposure from the start of the employment relationship by having effective and enforceable employment contracts in place with clear and lawful termination provisions that address both 'just cause' and 'without cause' terminations. This is the single best way for an employer to predict, contain, and control the costs associated with termination and to deter litigation from a dismissed (and possibly disgruntled) employee;
- **Exploring the Cost Benefit Analysis Between a 'with' or 'without cause' scenario.** In theory, a 'just cause' termination is supposed to save the company money. If the employer has legal 'just cause' to terminate the individual's employment, the employee is not legally entitled to reasonable notice of termination or a severance payment. This potential major economic benefit carries with it what I'll call "hidden costs." The opportunity to save money can cloud sober managerial judgment and spin factual interpretation towards supporting a just cause termination that is without merit. Bear in mind that a court will review the employer's just cause defence with intense scrutiny and, sometimes, even skepticism. In court, the employee will often receive the benefit of any doubts or gaps in the evidence. Accordingly, terminations for 'just cause' must be supported by compelling evidence. In addition, an employee who has been terminated for just cause has very little to lose by taking the employer to court or, at the very least, engaging legal counsel to threaten legal action to obtain an "out of court" settlement. Not surprisingly, legal defence costs may eclipse any possible 'just cause' cost savings;
- **Can We Prove Just Cause?** The rule to adhere to with limited exceptions is that if you can't prove it; don't rely on just cause for the employee's termination. This dovetails with the point above. The risk of increased liability for moral damages and possible mental distress and tort liability usually militates against terminating someone for 'just cause', particularly where the evidence is vaporous. The document trail and witness statements must line up in support of the employer's decision. The allegations of misconduct and wrongdoing must be investigated. Without an evidentiary bedrock needed to make the employer's case, the possible 'hidden costs' may outweigh the possible cost benefit of simply proceeding on a 'without cause' basis;
- **Should the just cause road be "taken at all"?** The short answer is absolutely yes! In the right cases it needs to be taken. Some types of employee misconduct are so egregious, unacceptable, and harmful to a business that an organization and community cannot tolerate such behaviour on an employee's part. The key is that the decision to terminate for just cause not be taken precipitously

in 2001. While at law school, Mark worked as a student supervisor at Community Legal Services and he represented Western at the 2000 Niagara International Moot Court competition where his team won first place. In 2011, Mark completed an LL.M. at Osgoode Hall Law School with a specialization in constitutional law.

At home, Mark is a proud dad and husband who, in his spare time, enjoys watching hockey and football, reading books about law, history, politics, and business, and listening to an eclectic mix of music on his iPod, much to the dismay of his ever understanding wife and energetic little girls.

and that the HR professional in concert with the business and legal counsel closely and carefully examine the situation and the facts before the decision is taken. In wrongful dismissal litigation where 'just cause' is in issue, the court will assess the totality of the employment relationship, the severity of the misconduct giving rise to the employer's termination decision (including how detrimental the conduct was or could have been to the employer), together with the proportionality of terminating the employee's employment for just cause.

These are just some of the important issues for an HR professional to consider when navigating the jagged shoals of employee terminations and when faced with the 'just cause' crossroads. There are clearly many other factors that should be weighed in the decision making process. The points identified in this article provide a useful starting point.

If you or someone you know encounters a situation that requires navigation through the veritable employment law minefield, please contact Mark Fletcher or any one of Grosman, Grosman & Gale LLP's other lawyers.

On the Lighter Side...

A few weeks after a young man had been employed he was called into the Manager of Human Resources' office. "What is the meaning of this?" the Manager asked. "When you applied for this job, you told us you had three years experience. Now I have discovered this is the first position you've ever held."

"True", the young man answered with a smile, "in your advertisement you said you wanted a person with imagination."

Workplace Law E-ssentials is a service for our clients and others dealing with human resource issues. It is not intended to be a complete statement of the law or an opinion. No one should act upon it without having a thorough examination of the facts of a specific situation with the assistance of legal counsel. This has been sent to you courtesy of Grosman, Grosman & Gale LLP.

www.grosman.com
Grosman, Grosman and Gale LLP
390 Bay Street, Suite 1100
Toronto, Ontario
M5H 2Y2

This email was created and delivered using [Industry Mailout](#)