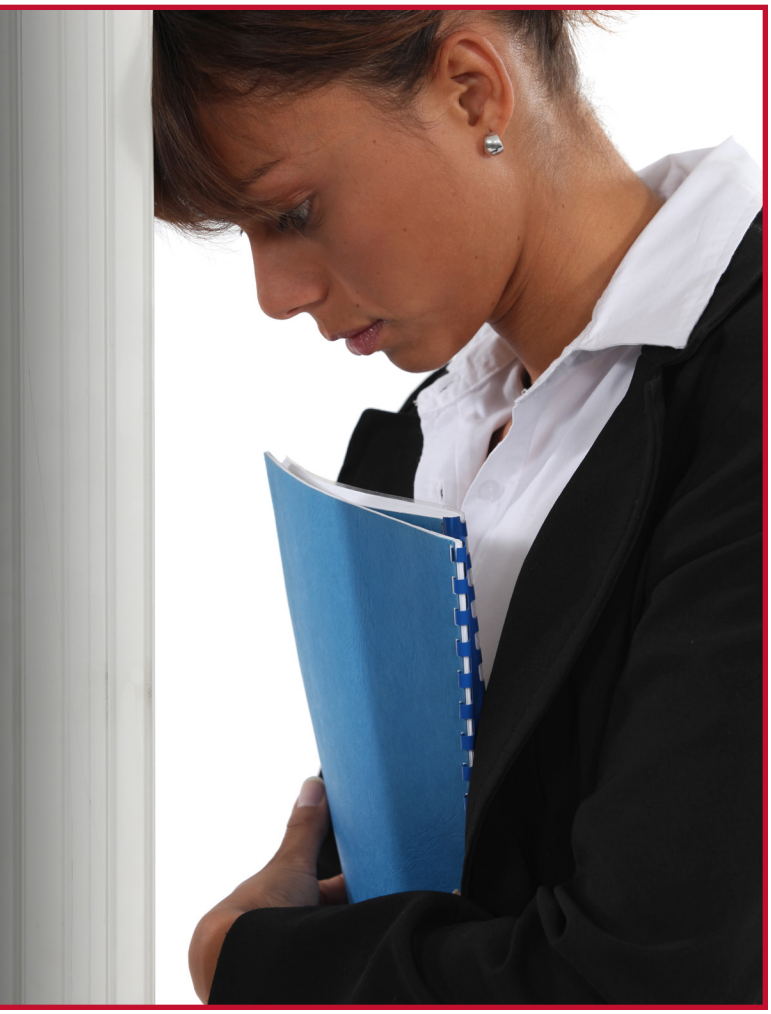
MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers



Except for particularly egregious, stand-alone incidents, a poisoned workplace is not created, as a matter of law, unless serious wrongful behaviour sufficient to create a hostile or intolerable work environment is persistent or repeated.

"Poisoned Work Environment"

Must Be More Than a Breakdown of Personal Relationships – says Ontario Court of Appeal

In recent years, the expression "poisoned work environment" has become increasingly popular in characterizing workplaces in which interpersonal relationships have broken down. An unfortunate side effect has been the casual, misuse of the expression by employees, to the chagrin of their employers.

The Court of Appeal for Ontario recently overturned a finding of a "poisoned work environment", and an award to a plaintiff of $160,000. In so doing, the court clarified the meaning of the expression, restricting its application to circumstances in which there has been a "particularly egregious" event, or where "serious wrongful behavior, sufficient to create a hostile or intolerable work environment, is persistent or repeated".

General Motors of Canada Limited v. Johnson

The case involves a black man, Johnson, who alleged racism on the part of a white man and co-worker, Markov, and complicity on the part of their employer, General Motors. There was conflicting evidence about who said what and the intention of the words spoken (complicated by the fact Markov died prior to the matter being heard at trial). However, the uncontroverted facts include the following:

- For nearly eight years, Johnson held employment at GM, most recently in the position of production supervisor. Among his responsibilities, Johnson trained group leaders in a mandatory new training program unpopular among plant employees.
- Markov, a group leader, was assigned to Johnson's training group but refused to attend purportedly because he did not like Johnson who, years prior, was alleged to have laughed at an insensitive comment about the murder of Markov's brother (by a black man).
- Shortly after Markov's refusal to attend training, another employee commented to Johnson that he too could have avoided training by claiming he was "prejudiced like the last guy whose brother was killed by a black man".
- On the basis of these two incidents, Johnson concluded Markov was racist. He complained to GM which conducted a workplace investigation finding there was no evidence of racially-motivated conduct on the part of Markov. Unhappy with this conclusion, and believing GM was complicit in

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minimizing Markov's behaviour, Johnson requested a fresh investigation which GM obliged – twice. However, the results of the investigations remained unchanged.

- Ultimately, Johnson went on a disability leave alleging discriminatory treatment due to racism in the workplace. In his view the workplace had been poisoned.
- After two years of leave, discussions ensued regarding Johnson's return to work. Alleging a fear of Markov, Johnson said he would only work at a corporate office and not at a plant. Having no jobs available at its corporate offices, GM offered Johnson the choice of positions at manufacturing plants a kilometre away from where Johnson had last worked. Johnson refused these options, claiming his disability prevented him from working in a plant environment, yet providing no medical evidence in support of this assertion. Ultimately, GM took the position Johnson had resigned.

The Lawsuit

Johnson sued GM, claiming more than $500,000 in damages for constructive dismissal, alleging he had been a victim of racism, and maintaining it would be unfair for him to be required to return to a "poisoned work environment".

At the trial, the judge found that while GM had not acted maliciously, it had not taken Johnson's complaints "sufficiently seriously" and failed to conduct "a reasonably comprehensive investigation into Johnson's complaint". The judge awarded Johnson $160,000 in damages, including $40,000 on account of GM's bad faith, plus an award of legal costs.

The Appeal

GM appealed to the Court of Appeal for Ontario which concluded that the trial judge's factual findings were not supported by the evidence (for reasons not salient to this article).

Significantly, the Court of Appeal also rejected the proposition that a "poisoned work environment" existed at GM, and in so doing, clarified the circumstances in which a workplace may be considered "poisoned":

> **Workplaces become poisoned for the purpose of constructive dismissal only where serious wrongful behaviour is demonstrated.** The plaintiff bears the onus of establishing a claim of a poisoned workplace. …. **[T]he test is an objective one. A plaintiff's subjective feelings or even genuinely-held beliefs are insufficient to discharge this onus.** There must be evidence that, to the objective reasonable bystander, would support the conclusion that a poisoned workplace environment had been created…
>
> Moreover, **except for particularly egregious, stand-alone incidents, a poisoned workplace is not created, as a matter of law, unless serious wrongful behaviour sufficient to create a hostile or intolerable work environment is persistent or repeated.**
>
> **…. Johnson's racism complaint arose from a single employee's failure to attend a single training session.** Such conduct falls short of the type of egregious behaviour manifested in those cases involving poisoned work environments. Johnson did not establish systemic or institutional racist behaviour. **I agree with GM's submission that a single incident of this kind, with a single employee, over the course of an eight-year working relationship cannot objectively ground a finding of a work environment poisoned by racism.** [emphasis added]

Tips for Employers

Not every allegation of discrimination in the workplace will be made out, and even fewer will result in a finding of a "poisoned work environment". Still, as the Court of Appeal correctly noted, "discriminatory treatment in the workplace due to racism is a serious claim that implicates the reputational and employment interests of the claimant as well as those of the alleged perpetrators".

To successfully defend against such a serious allegation, every workplace should have a set of meaningful protocols and practices. This includes:

- Written rules prohibiting discrimination and harassment.
- A program to train managers and employees on what the rules mean and how they will apply.
- A process to thoroughly and appropriately investigate complaints of discrimination or harassment, in a timely fashion.
- A commitment and the means to implement remedial steps and/or discipline, consistently, fairly and transparently.

Complying with these requirements can be a minefield for employers. To avoid missteps, consider the aid of expert legal counsel who can assist the organization in: preparing discrimination and harassment policies; carrying out workplace training; structuring and/or conducting workplace investigations; and implementing remedial steps and/or discipline.

DID YOU KNOW?

The Canadian economy lost $16.6-billion last year due to absenteeism *(Conference Board of Canada)*.

Highest absenteeism rates were within the health care and social assistance sectors. Public sector employees were absent for an average of 12.9 days, compared with 8.2 days for the private sector; and unionized workers were absent an average of 13.2 days, compared with 7.5 days for non-unionized workers.

Never Too Late to Mitigate

Most non-unionized employees assume that once employment has been terminated, any further obligation to work for their former employer is likewise terminated. These employees would be surprised to learn that even if they have been wrongfully dismissed and start a lawsuit, their right to termination compensation can still be lost if they are requested to return to work.

Consider the case of Active Tire & Auto Centre ("Active"). A chain of automotive repair stations, Active was experiencing poor financial performance at its Niagara Falls location, one of 28 Speedy Muffler sites recently acquired. To reduce costs, Active laid off Earl Chevalier, a service manager inherited from Speedy, paying him four weeks' pay. The decision to lay off was made without the benefit of legal advice and under a mistaken impression the layoff could be implemented without incurring liability.

Court Proceedings and a Reinstatement Offer

At the time of his layoff, Mr. Chevalier was 55 years old with 33 years' service. He wasted no time retaining legal counsel and, within two weeks, Active was served with a statement of claim alleging constructive dismissal and seeking damages of more than $95,000.

Active responded speedily, delivering a letter of apology which included an offer of Mr. Chevalier's job back on terms identical to those that existed at the time he was laid off. Mr. Chevalier refused Active's offer, insisting he was not obliged to return to work.

The Trial

At trial, Active admitted the layoff was a constructive dismissal, but argued Mr. Chevalier's refusal to return to work was a breach of his duty to "mitigate his damages". The duty to mitigate is a general obligation at law, which obliges a party who has been subjected to a breach of contract to take reasonable steps to avoid or minimize loss.

Active relied on a legal precedent, *Teamsters v. Evans*. In that case, a long-term employee was terminated from his employment but invited to return soon afterward. The Supreme Court of Canada held that an employee terminated from employment can be obliged to return to work in situations:

> [w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious … [O]ther relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left …

In an effort to distinguish his circumstances from *Evans*, Mr. Chevalier claimed he had been harassed prior to his termination, thus it would not have been reasonable for him to have returned to work in a hostile or humiliating atmosphere. Mr. Chevalier also pointed to the fact the invitation to return to work had not occurred until after he had started a lawsuit against Active – further evidence, he said, that the workplace had been poisoned.

The trial judge accepted Active's evidence that the layoff was an innocent error. The primary question then became whether the atmosphere of the workplace made it demeaning for Mr. Chevalier to have returned. On this issue, the trial judge found Mr. Chevalier to be an honest and credible witness, but one who had misconstrued events. Said the court, what Mr. Chevalier regarded as harassment was legitimate coaching and counseling aimed at educating him regarding Active's business model which differed from that of Speedy. Furthermore, the court found that the commencement of Mr. Chevalier's lawsuit, though a factor to be considered when assessing whether the workplace had been poisoned, was not determinative of the issue. Mr. Chevalier's lawsuit was therefore dismissed.

The Appeal

Mr. Chevalier appealed to the Court of Appeal for Ontario which concluded the trial judge had properly applied the legal principles in *Evans*, determining it would not have been demeaning or otherwise unreasonable for Mr. Chevalier to have returned to work. His appeal was dismissed.

...it may be possible for an employer to turn back the clock and require a terminated employee to meet his/her mitigation obligation by offering the employee their job back.

Tips for Employers

From time to time, even the best run workplace can expose itself to liability because of an unintended termination, or one followed by second thoughts. In these circumstances, it is important to know that it may be possible for an employer to turn back the clock and require a terminated employee to meet his/her mitigation obligation by offering the employee their job back.

Should these circumstances arise in your workplace, consider the following tips:

- When faced with an employee claiming to have been constructively dismissed, swift action is imperative.
- The first step before responding to the employee is to investigate the facts to determine if it is desirable and appropriate to invite the employee to return to work.
- If a decision is made to invite an employee back, the offer should be made in writing in a courteous and professional manner. A confrontational or defensive approach may be held up as evidence of a hostile environment, relieving the employee from the duty to return.
- An offer to return should be on the same terms and conditions as those which existed at the time of the layoff.
- If the employee's absence has resulted in an interruption of income, consider making up the employee's loss.

When these types of situations present themselves, intricate and challenging legal issues arise. To avoid missteps, it is advisable to obtain expert legal advice as soon as possible.

MANAGEMENT COUNSEL

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

2014 Workplace Resolutions!

A new year means a fresh list of New Years' Resolutions. *Eat better. Work out more. Stress less. Enjoy life.*

What about our workplace lives? As managers and leaders, many of us spend the majority of our day at work or thinking about work. What steps can we take to make our workplace lives happier and more productive?

Consider these Three Workplace Resolutions:

1. Find 'The One'

The recruitment and hiring process presents opportunities and challenges for every type of employer. Great leaders, managers and employees make for a great workplace, but hiring the wrong person can be a costly mistake. Learn about best practices in the hiring process, including:

- Human rights considerations in advertisements and interviews
- Social media and background checks
- The employment contract
- How and when to make the offer

2. Lose 10 Pounds (or 165….)

You've done your best but it's still not working. Learn about strategies to minimize risk when ending an employment relationship, including how to structure the termination meeting, the package and the release.

3. Get Happy!

Happy employees are good for business. Learn about the benefits of a motivated workforce as well as strategies to get the most from your employees.

DATE: **Tuesday January 21, 2014; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Hilton Garden Inn Toronto/Vaughan,** 3201 Highway 7 West, Vaughan, ON L4K 5Z7

COST: Please be our guest

RSVP: **By Friday January 10, 2014 at www.sherrardkuzz.com/seminars.php**

Law Society of Upper Canada CPD Credits: This seminar may be applied toward general CPD credits.

HRPAO CHRP designated members should inquire at www.hrpa.ca for certification eligibility guidelines regarding this *HReview Seminar*.

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Jean Cumming Lexpert® Editor-in-Chief

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