

# MANAGEMENT COUNSEL

Employment and Labour Law Update



In hiring, the result is a preference for other humans most like ourselves, to the detriment of visible minorities, older candidates, members of the LGBTQ communities, and those with a disability (among others).

## *What's in a name?* Federal Public Sector to Pilot Name-Blind Hiring

Despite our best intentions, unconscious bias continues to shape hiring decisions and undermine workplace diversity and inclusion efforts. A recent study conducted by the University of Toronto and Ryerson University (“Canadian study”) shows that, as between two equally qualified candidates, an English-speaking recruiter is 20-40% more likely to hire a candidate with an English name than a non-English name. Hiring diversity improves slightly (but not greatly) in larger organizations (500 or more employees) in which diversity programs are more commonly implemented.

Article by  
Natalie Garvin

*As between two equally qualified candidates, an English-speaking recruiter is 20-40% more likely to hire a candidate with an English name than a non-English name.*

This important issue has caught the attention of the Government of Canada which, in October 2017, will implement a *name-blind* hiring pilot program in six departments of the federal public service. Under the program a candidate’s name and other identifying information is removed from an application before a hiring manager views it. The goal is to remove any implicit or unconscious bias that may influence the selection of a candidate, focusing instead on the candidate’s qualifications and experience.

### Why the fuss?

Unconscious or “implicit” bias has existed as long as humankind. It is a by-product of the brain’s need to rely on assumptions to process large volumes of information, including about other human beings, based on what feels safe, familiar, likeable and valuable. A consequence is the making of split-second judgments about strangers, not always with positive consequences. In hiring, the result is a preference for other humans most like ourselves, to the detriment of visible minorities, older candidates, members of the LGBTQ communities, and those with a disability (among others).

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So deep-rooted is this human bias that some academics and consultants now question the value of diversity training that pins its hopes on educating people to rise above their prejudices. In her book, *What Works: Gender Equality by Design*<sup>1</sup>, Professor Iris Bohnet, a behavioural economist at Harvard University, argues that rather than trying to alter people, employers should change their processes to limit the opportunity for bias.

This leads us to name-blind hiring.

### The Government of Canada takes action

In October 2017, the federal government will implement a name-blind hiring process in six departments of the federal public service:

1. National Defence
2. Global Affairs Canada
3. Immigration, Refugees and Citizenship Canada
4. Public Services and Procurement Canada
5. Environment and Climate Change Canada
6. Treasury Board of Canada Secretariat

Results from the name-blind process will be measured against results from the traditional screening method, and, if desired results are achieved, the program may be expanded to other government departments and agencies.

### Tips for employers

Although neither the federal nor provincial governments have indicated an interest in legislating name-blind hiring, under the *Canadian Human Rights Act* (applicable to federally regulated employers) and the human rights codes of the various provinces and territories, an employer is already prohibited from discriminating against a candidate when making a hiring decision, on a variety of grounds, many of which can be the subject of unconscious bias, including:<sup>2</sup>

- Race
- Ethnic and/or National Origin
- Colour
- Ancestry
- Citizenship
- Creed / Religion
- Sex

- Sexual Orientation
- Gender Identity
- Gender Expression
- Marital Status
- Family Status
- Disability
- Age
- Record of Offences / Conviction for which a pardon has been granted or record suspension ordered

When making a decision about a candidate, ask yourself why you prefer that candidate over another and, to the extent possible, consider the following hiring best practices:

1. Formulate clear expectations regarding the qualifications, experience, and qualities the job requires.
2. Ensure the job posting and any verbal representation about the job is accurate and free of direct or indirect discrimination (e.g., “looking for a young, female sales rep...”).
3. Ask standardized questions.
4. Devise questions that solicit information necessary only to determine whether the candidate has the skill and ability to perform the position.
5. Avoid questions that might solicit information about a protected ground (e.g., place of origin, marital status, membership in a certain group or organization, etc.)
6. Implement a name-blind selection process.
7. Use a numeric rating scheme to make the hiring process as objective as possible.
8. Use a diverse hiring panel to counter unconscious bias.
9. Explain your reasoning for hiring a candidate to another person to minimize the chances the decision was not clouded by an unconscious bias.

<sup>1</sup>Iris Bohnet, *What Works: Gender Equality by Design*, (Cambridge: Harvard University Press, 2016).

<sup>2</sup>“Protected grounds” vary among Canadian jurisdictions. For information about a specific jurisdiction, contact Sherrard Kuzz LLP.

*For more information and assistance, contact the employment law experts at Sherrard Kuzz LLP.*

## DID YOU KNOW?

On June 1, 2017, Bill 145 – *Coverage for Workers in Residential Care Facilities and Group Homes Act, 2017* – passed first reading in the Ontario Legislature. If the Bill becomes law, an employer (public or private) in the residential care or group home industry will become a Schedule 1 Employer and, as such, can no longer *opt in* to WSIB coverage. Coverage will be mandatory.

A residential care facility includes, but is not limited to, a retirement home, rest home and senior citizens’ residence.

To learn more, contact the WSIB experts at Sherrard Kuzz LLP.

## Supreme Court of Canada Upholds Termination of Truck Driver Who Fails Test for Cocaine; Claims Addiction



Natasha Zervoudakis\*  
416.603.6250  
nzervoudakis@sherrardkuzz.com

In our August 2016 edition of *Management Counsel* we advised readers of an important Alberta Court of Appeal decision (originated before the Alberta Human Rights Commission) in which there was found to be no discrimination against a truck operator who was dismissed following a workplace accident, positive test for cocaine, and subsequent claim to have a drug dependency [*Elk Valley Coal Corporation*].

### What happened (a recap)?

The employer's drug and alcohol policy required employees to proactively disclose drug dependency without fear of discipline or termination, with the promise of rehabilitation assistance. However, if an employee did not disclose until after an incident and positive test, the employee would not be shielded from discipline or termination.

Mr. Stewart's employment was terminated two weeks after he drove his truck into another and tested positive for cocaine. During the investigation, he acknowledged a history of drug use and claimed to have a drug dependency which, he said, caused him to deny his addiction and fail to disclose, contrary to the policy.

*Although Mr. Stewart had an addiction, he was not fired because of it, but rather because he failed to disclose his drug use as required by the policy.*

Mr. Stewart was dismissed because he breached the policy by failing to proactively disclose, not because he used drugs or had a dependency. He was offered an opportunity to be reinstated in six months with proof of successful completion of a rehabilitation program, half the cost of which would be covered by the employer. Mr. Stewart rejected the offer and instead complained to the Human Rights Commission alleging discrimination on the basis of a disability (addiction).

### Disability not the reason for dismissal

The Commission, Alberta Court of Queen's Bench and Court of Appeal found that although Mr. Stewart had an addiction, he was not fired because of it, but rather because he failed to disclose his drug use as required by the policy. They also found that, despite his addiction, Mr. Stewart nevertheless had the capacity to comply with the policy and make the requisite disclosure, but chose not to. He therefore suffered no adverse impact by virtue of his disability.

### Supreme Court of Canada upholds dismissal despite addiction

On appeal, the Supreme Court of Canada upheld the dismissal on the basis that addiction did not *necessarily* mean the inability to comply with a company policy. To the contrary, each case had to be decided on its own facts on a case-by-case basis:

It cannot be assumed that Mr. Stewart's addiction diminished his ability to comply with the terms of the Policy. In some cases, a person with an addiction may be fully capable of complying with workplace rules. In others, the addiction may effectively deprive a person of the capacity to comply, and the breach of the rule will be inextricably connected with the addiction. ... Many cases may exist somewhere between these two extremes. The connection between an addiction and adverse treatment cannot be assumed and must be based on evidence [on a case-by-case basis] [emphasis added].

### Lessons for employers

*Elk Valley* demonstrates the benefit of having a well-designed drug and alcohol policy which offers immunity for proactive self-disclosure, and access to treatment.

The employer's policy did not contain a zero-tolerance standard with harsh and immediate consequences for a violation. Rather, it offered support for an employee on the condition of self-reporting. By designing the policy this way, the onus shifted to Mr. Stewart to justify his decision to not disclose a dependency prior to the incident. As he failed to offer a persuasive justification, the court upheld his termination for cause.

The decision also confirms that parties and adjudicators ought not to assume addiction *necessarily* means an employee does not have the capacity to comply with workplace rules. Each case must be decided on its own factual basis.

As a result, an employer concerned about the impact of drugs and alcohol in its workplace should consult with experienced counsel and consider the benefits of implementing a policy that:

- Requires an employee to proactively disclose drug use that may impair the ability to perform work safely (including prescription and legal recreational).
- Provides immunity for proactive self-disclosure, and access to treatment.
- Appropriately addresses safety, privacy and human rights issues.
- Identifies consequences in the event of a breach (*i.e.*, discipline and termination), including failure to disclose drug use and/or participate in testing.

\*With the assistance of Renée Sambrook

For more information and assistance, contact the employment law experts at Sherrard Kuzz LLP.

## HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

# Let's Talk About Sex: Workplace Indecencies and Indiscretions

Workplace indecencies and indiscretions, particularly of a sexual nature, can have catastrophic consequences for an employer. Not only do these types of infractions often attract high profile (and unwanted) media attention, they also risk the degradation of workplace morale, company reputation and, by extension, business productivity and success. Join us as we identify issues and best practices relating to:

### Sexual Harassment

- What is sexual harassment?
- When is an employer liable for sexual misconduct in the workplace?
- What is the range of penalty?

### Workplace Romance

- Is an anti-fraternization policy a good idea?
- What type of conduct can an employer legitimately prohibit in the workplace?

### Off Duty Conduct

- When does sexual misconduct that occurs outside of the traditional workplace become a workplace issue?
- What is an employer's responsibility when it comes to "sexting", sexualized emails, and other explicit social media based communications?
- When can an employer discipline or discharge an employee for off duty conduct?
- How should an employer respond to questions from the media?

**DATE:** Wednesday, September 27, 2017, 7:30 – 9:30 a.m. (breakfast at 7:30 a.m.; program at 8:00 a.m.)

**VENUE:** Hazelton Manor, 99 Peelar Road, Vaughan, ON L4K 1A3

**COST:** Complimentary

**RSVP:** By Monday, September 11, 2017 at [www.sherrardkuzz.com/seminars.php](http://www.sherrardkuzz.com/seminars.php) (spaces limited)

**Law Society of Upper Canada CPD Hours:** This seminar may be applied toward general CPD hours.

HRPA CHRP designated members should inquire at [www.hrpa.ca](http://www.hrpa.ca) for eligibility guidelines regarding this *HReview Seminar*.

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250 Yonge Street, Suite 3300  
Toronto, Ontario, Canada M5B 2L7  
Tel 416.603.0700  
Fax 416.603.6035  
24 Hour 416.420.0738  
[www.sherrardkuzz.com](http://www.sherrardkuzz.com)  
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Jean Cumming Lexpert® Editor-in-Chief

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