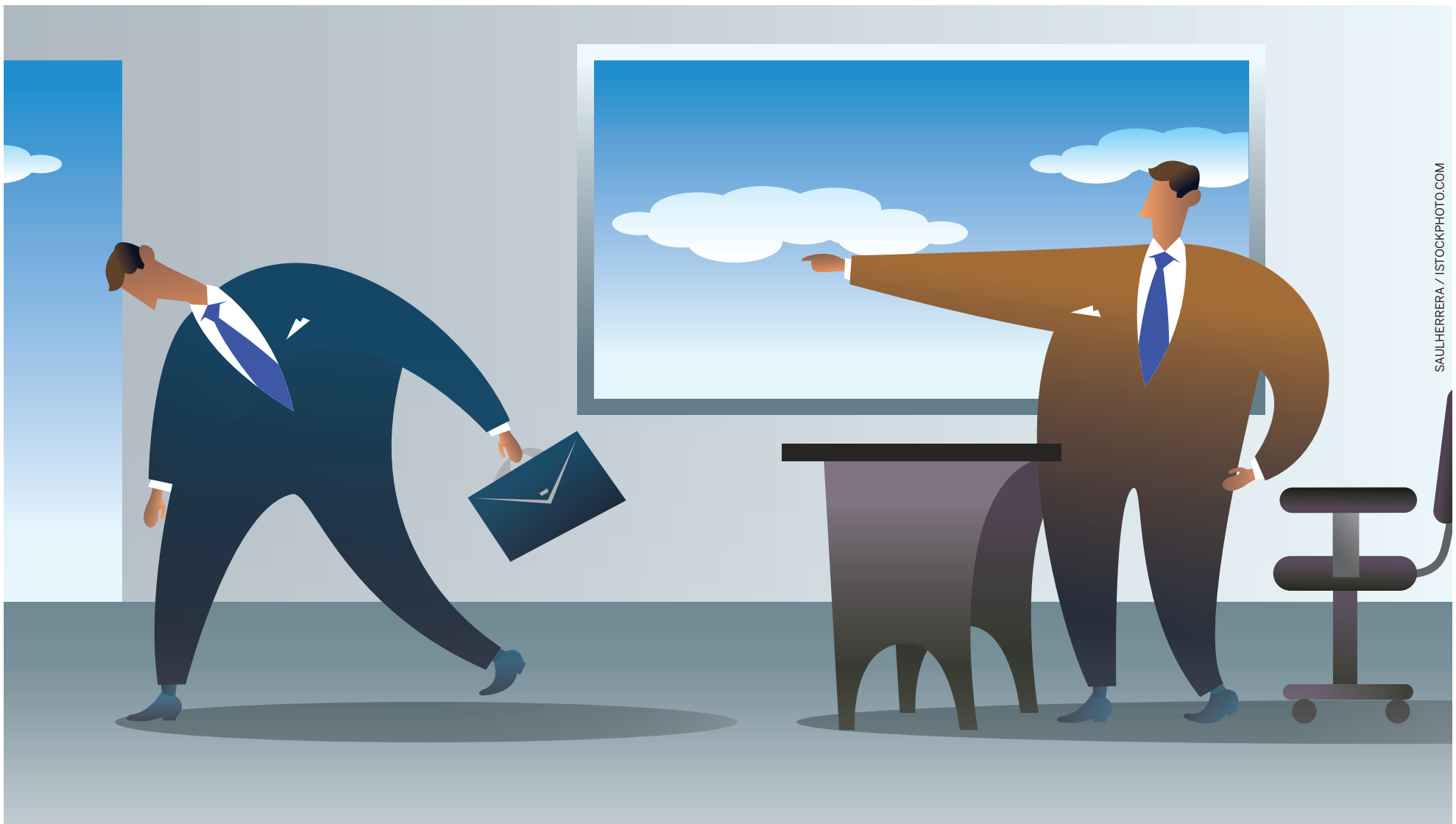
Focus

LABOUR & EMPLOYMENT



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Employers behaving badly

Two cases illustrate the high price paid for not treating employees fairly

Sarah Crossley

Two decisions of Ontario's Superior Court of Justice are a keen reminder to employers that individuals should be treated fairly and with respect — during their employment and in the manner of their termination of employment.

In its decision of *Strudwick v. Applied Consumer & Clinical Evaluations Inc.* 2015 ONSC 3408, the court noted the employer's "horrendous" conduct and awarded not only 24 months pay in lieu of notice but also punitive damages and damages for violations of Ontario's *Human Rights Code*.

At the time of her dismissal, the plaintiff employee, Vicky Strudwick, was 56 years old and had been employed with Applied Consumer & Clinical Evaluations (the company) for more than 15 years. Her duties included data entry and instructing recruiting staff. About one year prior to her termination of employment, Strudwick became deaf, which her doctors advised was likely due to a virus.

After she lost her hearing, the employee requested accommodation, including: having the Canadian Hearing Society attend the workplace to determine what accommodations were necessary; bringing a support dog to the workplace (notably, the owner who is not disabled often brought his dogs to the office); reversing the direction of her desk so she could see people entering the office or approaching; the purchase and use of TTY equipment or the installation of a voice carry-over telephone (which she offered to purchase herself); and the installation of a visual fire alarm at her desk (which she also offered to purchase). All of these requests were refused.

The plaintiff employee presented uncontested evidence that her employer's attitude toward her, and treatment of her, became unconscionable; she was constantly belittled, humiliated and isolated. One manager told her, "Why don't you just quit? You can go on disability."

Before she became deaf, the plaintiff employee belonged to a voluntary public speaking club that held meetings at the company's site. While she prepared a list of topics (as was her responsibility) for one of these meetings, she did not select nor speak on any topic for the requisite one or two minutes. The next day, she was yelled at by a manager and called "a goddamned fool" in front of other employees. She was then dismissed for "insubordination and willful misconduct" for her "stunt" the day before. When the plaintiff employee refused to sign a letter regarding her termination and waiver, she was escorted from the building.

The company did not pay Strudwick for work performed until Labour Community Services of Peel Region intervened and her employment insurance was delayed as a result of the manner in which her record of employment had been completed.

The court noted "the circumstances at hand places the plaintiff at the highest level for the number of months of notice" and awarded 24 months. Given the employer's "abject failure to consider or accommodate [the employee] despite her repeated, reasonable and varied requests," the court also awarded $20,000 in damages to compensate the plaintiff employee for injuries to her "dignity, feelings and self-respect" contrary to Ontario's *Human Rights Code* and as supported by the medical evidence provided to the court. Instead of supporting the plaintiff employee, the court admonished the company's misconduct and awarded $15,000 in punitive

Sanctioned, Page 15

Focus LABOUR & EMPLOYMENT

Rolling the dice on parental leave a dangerous game

Reliance on limited exemptions resulting in more wrongful terminations over maternity issues


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It is hard to fathom that employers still do not seem to be fully aware of their obligations to employees on parental leave or returning from parental leave. Over the past several years we have seen a dramatic increase in employees being wrongfully terminated contrary to federal and provincial legislation intended to protect their employment during leave.

The *Canada Labour Code (CLC)* (s. 209.1) and Ontario's *Employment Standards Act* (*ESA*) (s. 53), as well as other similar provincial statutes, provide that an employee who has taken parental leave must be reinstated to his or her former position or given a comparable position in the same location with the same wages and benefits. Corresponding human rights legislation also provides that employers must not dismiss, suspend, lay off, demote or discipline an employee because he or she has applied for or taken maternity/parental leave.

The intent of these statutes is clearly to protect employees from having their employment undermined not only by the loss of a title but also to ensure that their positions, duties and responsibilities are not changed or altered in a manner that would amount to being punished for having taken maternity/parental leave. Canada as a nation has imposed legislation with an overarching social purpose of facilitating childbirth and child rearing by providing parents with up to one year parental leave without fear of repercussions in relation to their employment: *CFRN-TV v. C.E.P.* 1998 ABQB 1030.

While this has been the law of the land for several years, employers do not seem to be getting the message and try to justify terminations on the limited exemptions under the law. An often cited case is *Moday v. Bell Mobility Inc.* [2013] C.L.A.D. No. 48, wherein an arbitrator was engaged to resolve a jurisdictional question of whether s. 242(3.1) of the CLC applied to Margaret Moday's claim for unjust dismissal, whereby her employer claimed that she had been terminated because of lack of work or because of the discontinuance of her function, or whether Moday's reinstatement rights after leave conferred by s. 209.1 of the CLC trumped that provision. While the adjudicator decided in favour of the employer in this case despite the limited jurisdiction to do so, the parties settled the case after the arbitration for more than the original severance offered. Many commentators believe that a judge would have exercised his/her jurisdiction and made a different decision. This case does not support employers' blanket claims justifying the termination of employees on maternity/parental leave under the guise of organizational restructuring.

These situations are very rare and have been limited to actual fundamental restructuring resulting in mass layoffs and downsizing whole departments due to lack of work or discontinuance of a business line or function. (For example: *Tremblay v. Cole Carriers Corp.* 2010 C.L.A.D. No. 142; *Clerk v. Canadian Pacific Railway Co.* 2004 FC 715; *McMurtry v. Air Canada* [2002] C.L.A.D. No. 536.) In these rare situations employers must establish that the termination was unrelated to an individual employee's leave. For instance, in *Opp v. Mackoff Law Corporation,* the B.C. Human Rights Tribunal recently ruled that an employee who was terminated while she was pregnant for being dishonest about when she found out she was pregnant, was not discriminated against as the tribunal found that the reason for her termination was unrelated to her maternity/paternity leave. These fact situations are unique and the onus is on the employer to establish compliance with the law. An employer cannot simply change the job title, redistribute duties, transfer the employee or allege a position has become redundant to justify termination but this seems is what many employers think they can do in an effort to defend dismissal of an employee on, or returning from, parental leave.

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>
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These employers are rolling the dice. They are exposed not only to significant litigation risk but also to serious reputational damage risk. Terminating employees in these circumstances is not only illegal, it is morally reprehensible. Employers expose themselves to human rights claims, punitive damage awards, reinstatement orders, as well as compensatory damages for reasonable notice periods. They may also have to pay benefits expected during a reinstatement period at the end of an employee's leave as well as future leave entitlement if the employee loses eligibility for subsequent parental leave as a result of their wrongful termination. Damages claims could be substantial and could include many unforeseen complex issues.

Reputational damage is harder to quantify. An employer who engages in such practices will damage its ability to attract the best and brightest and will be serving notice to those employees who remain that they too may be at risk, particularly if they plan on raising a family. Such practices are also damaging to customer and supplier relationships, to varying degrees, depending upon the industry. Employers who understand this and either avoid the issue or provide proper compensation will have a competitive advantage over those that are shortsighted. Acting in good faith and exhibiting fair practices will assist employers to avoid significant legal expense as well as promote responsible business practices.

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Sanctioned: After arbitration notice, company ended employment agreement

Continued from page 14

damages. The court described the company's behaviour as harsh, demeaning, deliberate and designed to force the plaintiff employee to quit.

As a means of sanctioning another employer "for its terrible conduct," the court awarded punitive damages of $100,000 in *Gordon v. Altus Group* 2015 ONSC 5663.

In this case, the plaintiff, Alan Gordon, sold the assets of his company to Altus Group Ltd. (the company) and was hired to continue on as an employee, pursuant to an employment agreement. The asset purchase agreement contemplated a future adjustment to the purchase price based on performance. As the adjustment date approached, there appeared to be a disagreement between the parties as to what the appropriate purchase price should be and the plaintiff, through his company, gave notice to activate the arbitration clause to resolve the dispute.

Relatively shortly thereafter, the company terminated the plaintiff's employment for just cause, claiming he had been terminated for several reasons, including: the use of derogatory and profane language in the workplace; speaking of senior personnel in derogatory terms; and misleading the company regarding a conflict of interest as well as the hiring of an employee who had been charged with fraud.

In the plaintiff's action for wrongful dismissal, the court concluded there was little merit to the employer's allegations and noted that upon the plaintiff giving notice for arbitration, the company wanted to end the employment agreement without paying severance. "In other words, they decided to be cheap and then conjured up a cause for firing in order to save money." The court described the company's conduct as "outrageous," "harsh" and a "bully tactic" and awarded Gordon $100,000 in punitive damages

Employers are well advised to treat their employees fairly and with respect. Whether during their employment or in the manner of termination, the message is clear — employers who engage in deliberate, harsh, mean and/or unconscionable behaviour may be sanctioned by the courts.

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