MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

Psychometric Testing

Is it a valid means of pre-employment screening?

We live in an era in which legal obligations can make it difficult – and costly – to say *goodbye* to a bad hire. Selecting the right candidate for a job is therefore critical. Unfortunately, a resume, interview and professional reference check can only offer so much insight. They don't necessarily indicate a candidate's intelligence, maturity, and whether and how well he or she is likely to handle stress, conflict and change.

To address this information gap, some employers have turned to psychometric testing as part of their pre-employment screening processes. While the use of psychometrics may provide useful data, an employer considering venturing down this path should be aware of the risks.

Five Criteria for a Sound Psychological Testing Protocol

As a general rule, use of psychological testing is permissible so long as it does not run afoul of human right legislation. As well, in a unionized environment, such testing must satisfy the following additional criteria:

1. It does not infringe a governing collective agreement or internal policy.
2. It is rationally connected to the job/position at issue.
3. It is valid and reliable.
4. It is administered fairly and reasonably.

Seems pretty simple, right? In fact, meeting these criteria can be easier said than done.

Human Rights and Privacy

Among the primary objections to psychological testing raised by employees and trade unions are that the tests are: (i) an unreasonable or unfair exercise of management rights; (ii) discriminatory (or applied in a discriminatory manner) and therefore a violation of a candidate's human rights; and (iii) an invasion of a candidate's personal privacy.

Consider the following:

While questions related to a candidate's mental health should not be posed directly by a prospective employer, the results of a candidate's psychological test may indirectly reveal or suggest a candidate suffers from a psychological disability. This is information to which an employer is not ordinarily entitled and which, absent the test results, would not have been discovered unless voluntarily disclosed by the candidate. However, once known by a prospective employer, regardless

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of how the information was garnered, the prospective employer has a duty not to discriminate, and potentially to accommodate the candidate under human rights legislation, adding another layer of complexity to an already complicated and time consuming recruitment process.

Similarly, a test may have other unintended consequences by screening out members of a particular group of candidates, contrary to human rights legislation.

Even with the best of intentions, ensuring a test is administered in a "fair" and "reasonable" manner can be problematic. This point is illustrated by the case of *Alberta Teachers' Association v. Calgary Board of Education* - a 2010 decision which considered the Calgary Board of Education's implementation of psychological testing to assess the leadership potential of principals and assistant principals.

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The Board of Education administered a series of psychological tests to incumbent principals and assistant principals who exhibited desirable leadership qualities. The results were to be used as a benchmark against which future leadership candidates would be measured. The union filed a grievance alleging the tests were invalid, unreliable, unrelated to the positions in question and, further, that the manner in which they were administered infringed the employees' personal privacy.

The arbitration panel allowed the grievance, in part. While the implementation of psychological testing was not itself in contravention of the collective agreement, the manner in which the tests had been administered was "maladroit and unreasonable". The panel found the Board of Education failed to provide incumbents with sufficient advance warning of the test, or to advise incumbents of the rationale for the test and the purpose for which the results would be used.

Best Practices for Employers

The risks associated with psychological testing may lead some employers to conclude this type of testing is not right for their workplace. However, if after weighing the pros and cons, you conclude psychological testing may benefit your workplace, consider the following best practices:

- Ensure the test is compliant with applicable human rights legislation.
- Ensure the test is compliant with any collective agreement and/or internal policy.
- Ensure the test is designed to assess a skill or ability that is a core requirement of the job.
- Do not make hiring decisions based solely on psychological test results. Psychological indicators may appropriately be considered as a *part* of the overall decision-making process. However, adjudicators have consistently held it is unfair and unreasonable to rely on such indicators alone.
- Select a testing protocol that is well-recognized and regarded by qualified professionals.
- Administer the test consistently and not just to 'some' applicants.
- Ensure test results are not shared more broadly than to make an informed hiring decision. If a third party is retained to interpret or assess test results, ensure that third party has sufficient privacy and confidentiality safeguards in place.
- Obtain informed consent from any candidate who will be subject to psychological testing. This includes providing the individual with an explanation of the tests to be administered, their purpose, how results will be used, and to whom results will be distributed.

If you have questions about psychometric testing or would like to learn more about how it may impact your organization, contact a member of Sherrard Kuzz LLP.

DID YOU KNOW?

According to Ontario's Ministry of Labour, in 2014/15,
the most common *Employment Standards Act* violations were regarding:

1. Public Holidays/Public Holiday Pay
2. Record Keeping
3. Overtime Pay
4. Vacation Pay/Vacation Time
5. Hours of Work: Excess Daily or Weekly

For more information and assistance becoming or remaining ESA compliant, contact a member for Sherrard Kuzz LLP.

Workplace Investigation Void - Complainant Had Not Agreed Director/Investigator was *Impartial*

In a recent decision *(Public Service Alliance of Canada v Canada (Attorney General)*, 2014 FC 1066) the Federal Court held a manager was not a "competent person" to conduct a workplace investigation under the *Occupational Health and Safety Regulations* of the *Canada Labour Code* (the "Regulations") because the employee who filed the complaint had not agreed the manager was "impartial". The Federal Court also expanded the interpretation of "violence" under the Regulations to include harassment in some circumstances.

The decision has broad implications for federally-regulated employers, creating obligations more onerous than for their provincial counterparts.

Background

An employee of the Canadian Food Inspection Agency (the "CFIA") filed a complaint against his supervisor alleging favouritism, humiliation, unfair treatment and lack of respect. In response, the CFIA assigned its Regional Director to conduct a fact-finding review of the complaint. The Director found there were communication issues and unresolved tensions between the complainant and supervisor, but no evidence of harassment. He concluded no further investigation was warranted.

The term "workplace violence" is broad enough to include harassment in certain circumstances.

The employee complained to a federal Health and Safety Officer (the "HSO") alleging the CFIA had not complied with the requirements under section 20.9 of the Regulations, in that the Director was not impartial and therefore not a "competent person" to conduct the investigation. Section 20.9 states:

1. In this section, "competent person" means a person who
   (a) is impartial and is seen by the parties to be impartial;
   (b) has knowledge, training and experience in issues relating to work place violence; and
   (c) has knowledge of relevant legislation.
2. If an employer becomes aware of work place violence or alleged workplace violence, the employer shall try to resolve the matter with the employee as soon as possible.
3. If the matter is unresolved, the employer shall appoint a competent person to investigate the workplace violence […].
4. The competent person shall investigate the workplace violence and at the completion of the investigation provide to the employer a written report with conclusions and recommendations.

The HSO agreed with the employee and directed the CFIA to appoint a "competent person" to investigate. This direction was successfully appealed to the Occupational Health and Safety Tribunal of Canada (the "Tribunal") on the grounds the alleged harassment did not amount to "*workplace violence*", as that term is defined under the Regulations, namely: "*any action, conduct, threat or gesture of a person towards an employee in their work place that can reasonably be expected to cause harm, injury or illness to that employee.*" The employee then asked the Federal Court to judicially review the Tribunal's decision.

Federal Court Decision

Siding with the employee, the Federal Court made the following important findings:

1. The term "workplace violence" is broad enough to include harassment in certain circumstances. In the present case, the alleged harassment might constitute workplace violence if, after a proper investigation by a competent person, it is determined the harassment could reasonably be expected to cause harm or illness to the employee.
2. A person is "competent" to conduct a workplace violence investigation if he or she is "impartial and seen by the parties to be impartial" and has the necessary knowledge, training and experience.
3. Where the proposed investigator is a representative of the employer, the parties must agree the representative is an impartial person. The employer cannot decide this unilaterally.
4. In the present case, while the Director may have been competent to conduct an initial fact finding in an effort to "resolve the matter" (*per* section 20.9 (2) of the Regulations), in the absence of agreement among the parties, he was not a "competent person" for the purposes of conducting an investigation.

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Tips for Employers

The Federal Court's decision raises the bar for federally-regulated employers, demonstrating the importance of strictly complying with the workplace violence and harassment procedures set out in the Regulations. While there are currently no similar requirements for provincially regulated employers, the Court's decision should and will be watched closely lest it gain traction outside the federal sphere. Regardless, one thing is clear for every jurisdiction: the lynchpin of a proper investigation is an impartial investigator, with sufficient knowledge, training and experience.

For more information and for assistance conducting a workplace investigation, contact the professionals at Sherrard Kuzz LLP.

MANAGEMENT COUNSEL

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Invisible and Episodic Disabilities

Managing an employee with a disability can be challenging - even more so if the disability is invisible or episodic.

Join this *HR*eview as we discuss workplace strategies to identify and address two prevalent invisible and episodic disabilities: **depression** and **allergies/sensitivities**.

Depression

The World Health Organization estimates by 2020 depression will be the second most common disability in the world – after heart disease:

- What are an employer's obligations in the case of an invisible disability such as depression?
- When is the duty to accommodate triggered?
- How might an employer balance its duty to accommodate with potential safety risks (for other employees, and the employee with the disability)?
- Best practices.

Allergies and Sensitivities

Peanuts, gluten, fragrances, smoke, workplace chemicals – allergies to these and other substances are on the rise, in some cases with the potential to threaten the life and safety of employees:

- Is an allergy a disability? Is an environmental sensitivity a disability?
- What is an employer's duty to accommodate under human rights legislation?
- What exposure might an employer face under occupational health and safety legislation if the employer is aware of an allergy and does not limit triggers in the workplace (*e.g.*, scents, *etc.*)?
- Best practices.

DATE: **Wednesday December 2, 2015; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Mississauga Convention Centre**, 75 Derry Road West, Mississauga, L5W 1G3

COST: Complimentary

RSVP: **By Monday November 16, 2015 at www.sherrardkuzz.com/seminars.php**

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 for eligibility guidelines regarding this *HReview Seminar*.

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