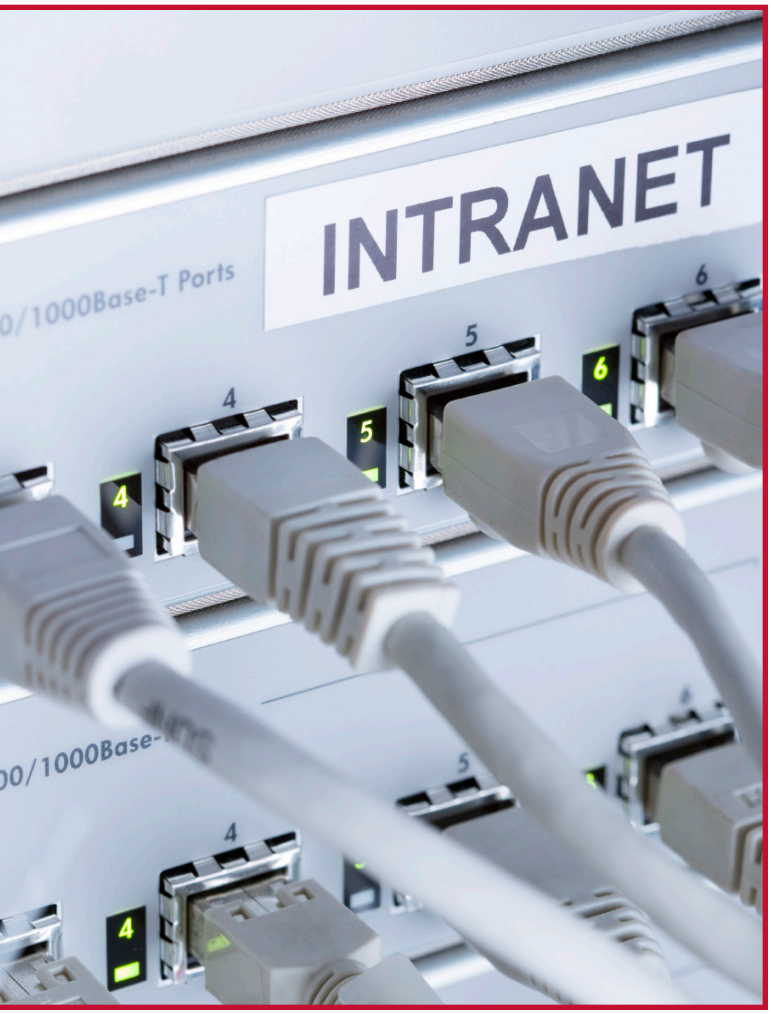
MANAGEMENT
COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers



Managing communications with employees can present a challenge, especially when a workforce can number in the thousands... A workplace intranet therefore seems like an ideal solution... However, as one Ontario employer recently learned, there are perils to relying on technology without the human touch.

Whirlpool Disappointed By What Comes Out in Judicial Wash

Managing communications with employees can present a challenge for employers, especially when a workforce can number in the thousands. Historically, reliance has been placed on individuals communicating workplace policies through meetings and in writing. However, this method of communication can be problematic and prone to error if an individual entrusted with the task fails to deliver. A **workplace intranet** therefore seems like an ideal solution. Able to reach thousands of employees with the click of a button, a workplace intranet can ensure communication is consistent and timely.

However, as one Ontario employer recently learned, there are perils to relying on technology without the human touch.

The Facts

Mark Poole (Poole) was a senior executive of lengthy service with his employer, Whirlpool. His employment was terminated on a without cause basis after he refused a severance proposal made by his direct report.

Poole launched a wrongful dismissal action against Whirlpool. The most important issue was Poole's claim for bonus compensation. Poole claimed he was entitled to a bonus calculated over the entire length of his notice period (found by the judge to be 19 months). In response to the claim, Whirlpool pointed to the language of its bonus policy which purported to disqualify an employee - such as Poole - from receiving bonus compensation in respect of bonus payments arising *after termination of employment.*

Although not incorporated into Poole's employment agreement, the bonus policy was posted on Whirlpool's intranet, available to all employees. Poole attested in unchallenged evidence he had not agreed to the terms of the bonus policy, and was unaware of the terms or that the policy was posted on the company's intranet.

The Decisions

The judge found in Poole's favour adding approximately $106,000 to his severance compensation. Whirlpool appealed but was unsuccessful. The Court of Appeal explained:

> The bonus eligibility precondition relied on by the appellants [Whirlpool] was not incorporated in the respondent's [Poole's] 2007 letter of employment; nor was there any evidence that the precondition was otherwise drawn to the respondent's attention at any time, whether orally, in writing, or by means

continued inside...

A "Traumatic" Decision

The Workplace Safety and Insurance Appeals Tribunal Reconsiders Entitlement to Traumatic Mental Stress Benefits

A recent decision from the Ontario Workplace Safety and Insurance Appeals Tribunal (WSIAT) lowers the threshold for entitlement to benefits for traumatic mental stress. An important departure from existing decisions, the decision has significant implications for employers in Ontario.

Under s. 13 of Ontario's Workplace Safety and Insurance Act (WSIA), an employee is entitled to receive Workplace Safety and Insurance Board (WSIB) benefits for traumatic mental stress if the employee has "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment".

Acute Reaction

The WSIA does not define the phrase "acute reaction." However, the WSIB's policy on Traumatic Mental Stress clarifies matters somewhat. According to the policy, an acute reaction is a significant or severe reaction to a work-related traumatic event that results in a psychiatric/psychological response. The reaction must result in an Axis I diagnosis in accordance with the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).

Sudden and Unexpected Traumatic Event

The phrase "sudden and unexpected traumatic event" is also not defined in the WSIA. However, the WSIA does state a claim for mental stress cannot arise solely from an employment decision such as termination, demotion, transfer or disciplinary action; a statement that is positive for employers.

The policy sheds additional light by stating a traumatic event may be a result of "a criminal act, or a horrific accident, and may involve actual or threatened death or serious harm against the worker, a co-worker, a worker's family member or others". Examples include:

- Witnessing a fatality or a horrific accident
- Witnessing or being the object of an armed robbery
- Being the object of
  - o physical violence
  - o death threats
  - o threats of physical violence where the worker believes the threats are serious and harmful to herself or others (*i.e.* a bomb threat)
  - o harassment that includes physical violence, threats of physical violence, being placed in a life-threatening or potentially life-threatening situation.

Previous WSIAT decisions have applied these criteria to limit benefit entitlement to situations in which the traumatic event involves a "real or perceived threat" to a worker, which is life-threatening or potentially life-threatening. This interpretation is consistent with the DSM-IV definition of post-traumatic stress, which requires a life-threatening or potentially life-threatening triggering event. This application of the policy has, until now, provided a degree of predictability for employers by narrowly restricting the circumstances in which a worker is entitled to receive benefits.

The Tribunal's Recent Decision

The WSIAT's recent decision (*Decision No. 483/11*) allowed an appeal by a worker who claimed she should be entitled to benefits for traumatic mental stress arising from a triggering event which was not life-threatening.

An educational worker was accused of striking a student in a grade five classroom. The school investigation exonerated the worker, but she claimed she suffered significant psychological harm and was unable to work as a result of the mental stress caused by the allegations. The worker's psychiatrist reported the event caused the worker to suffer major depression, itself an Axis I diagnosis under the DSM-IV, but acknowledged she did not meet the diagnostic requirements for post-traumatic stress disorder because there was no precipitating life-threatening event. As a result, the WSIB denied the claim for traumatic mental stress benefits.

The WSIAT overturned the decision. Rejecting the long-standing practice of requiring the traumatic event to be life-threatening, the tribunal held the examples in the policy (referred to above) were not exclusive and to interpret them as such would be inconsistent with s. 13 of the WSIA, which does not expressly define the phrase "sudden and unexpected traumatic event."

According to the WSIAT, to satisfy the requirement for a "sudden and unexpected traumatic event," an employee need only establish the precipitating event giving rise to the Axis I diagnosis meets the following criteria:

- Clearly and precisely identifiable
- Objectively traumatic
- Unexpected in the normal or daily course of the worker's employment or work environment.

The WSIAT's decision creates a much lower threshold for entitlement to benefits and marks a distinct shift away from previous decisions, which required objective evidence of a life-threatening triggering event. Other provinces are considering similar changes to the threshold including, for example, British Columbia.

Implications for Employers

For an employer, this decision has both positive and negative implications.

On the positive side, an employee's entitlement to WSIB benefits is granted in *lieu* of all rights of action against the employer. As such, an *increase* in the scope of entitlement to benefits under the WSIA should result in a corresponding *decrease* in the employee's

A claim for mental stress cannot arise solely from an employment decision such as termination, demotion, transfer or disciplinary action.

right to sue his employer for compensation for traumatic mental stress arising out of or occurring in the course of employment.

Employers should therefore expect to see fewer lawsuits brought by employees for damages for traumatic mental stress. In the event an employer is sued by an employee for such damages, the employer may now be in a stronger position to argue the employee's right to commence an action against the employer has been taken away by the WSIAT.

The WSIAT's decision creates a much lower threshold for entitlement to benefits and marks a distinct shift away from previous decisions, which required objective evidence of a life-threatening triggering event. Other provinces are considering similar changes to the threshold including, for example, British Columbia.

On the negative side, this shift in the scope of entitlement to benefits carries with it the potential for a significant increase in the number of successful claims by employees for WSIB benefits for traumatic mental stress. A successful claim typically means an increase in the employer's cost statement, a reduction in rebates or an increase in annual premiums required to be paid, each of which has financial implications for an employer.

To learn more and/or for WSIA assistance in your workplace please contact a member of Sherrard Kuzz LLP.

DID YOU KNOW?

Federally-regulated employers can breathe a sigh of relief they won't be on the hook for a complainant's legal costs associated with a human rights proceeding. The Supreme Court of Canada recently confirmed the Canadian Human Rights Tribunal has discretion to award a successful complainant "expenses" – but not "legal costs" - and that the former has a more narrow definition than the latter. The Supreme Court's decision is good news for employers. From now on *neither* an employee *nor* an employer may be reimbursed for *legal costs incurred* successfully advancing or defending a federal human rights complaint. To learn more contact a member of Sherrard Kuzz LLP.

...continued from front

of the appellants' internal intranet communications system, or that he ever agreed to it.

In short, evidence was required to prove Poole had been notified of the terms of the bonus plan; the mere act of posting it on the company intranet did not satisfy this requirement.

Lessons Learned for Employers

A workplace intranet can be an efficient method of communicating company policy provided humans are integrated into the process. Communication of a workplace policy is not an issue which can be left solely with the company's IT department. Many policies are legal contracts which create substantial potential corporate liability. The *manner* in which a policy is communicated is a legal issue which can be just as important as what the policy actually says. Best practice suggests:

Communication of a workplace policy is not an issue which can be left solely with the company's IT department. Many policies are legal contracts which create substantial potential corporate liability. The manner in which a policy is communicated is a legal issue which can be just as important as what the policy actually says.

- When an important policy is posted on a workplace intranet, such as an annual bonus plan, the posting may be accompanied by a distribution email addressed to employees who are intended to be affected by the policy.
- A policy posted on the intranet should be accompanied by a requirement the employee notify the employer of his or her agreement.
- There are automated methods available to record an employee's agreement, such as requiring the employee to log on to a password protected area. If such technology is not utilized, the most prudent course is to ensure the employee provides his or her signature on a printout of the workplace policy.
- There are automated procedures available to keep track of and remind anyone who fails to provide agreement to a workplace policy. Even if such automated tracking is utilized, at some point a human may be required to secure compliance.
- Review the strategy of communication with legal counsel to ensure it will be enforceable if ever reviewed by a judge.

To learn more or for assistance developing and/or communicating a workplace policy in your organization, please contact a member of Sherrard Kuzz LLP.

DID YOU KNOW?

As of April 1 2012, the *Public Sector Compensation Restraint to Protect Public Services Act, 2010* ("Bill 16") which "froze" the compensation structures of non-unionized provincial employees, will no longer be in effect? If your organization was impacted by Bill 16 and you would like to learn more, contact a member of the Sherrard Kuzz LLP team.

Please join us at our next HReview Breakfast Seminar:

HReview
Seminar Series

Remaining Union Free: How to Plan, Prepare and Win

1. **The new age**
   - Union organizing strategies and what unions are doing to win
2. **Buyer beware**
   - The Impact of Neutrality Agreements and International Framework Agreements
3. **Pamphleting and internal organizing**
   - Immediate steps employers should consider
4. **An employer's right to speak**
   - How to communicate without breaking the law
5. **The unexpected fax**
   - What to do if you receive an Application for Certification
6. **Running a successful campaign**
   - It's never too late to win
7. **Update from the Ontario Labour Relations Board**
   - Which unions are active in which industries

DATE: **Thursday March 22, 2012; 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 Hwy 7 West, Vaughan, ON L4K 5Z7

COST: Please be our guest

RSVP: **By Monday March 12, 2012** to 416.603.0700 or register on-line at *www.sherrardkuzz.com/seminars.php* (for emergencies our 24 Hour Line is 416.420.0738)

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

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

To subscribe to our free newsletter, published six times a year:

- Visit **www.sherrardkuzz.com**, select **Newsletter**, and complete your contact information. Or:
- Contact us directly at info@sherrardkuzz.com or 416.603.0700.

SHERRARD KUZZ LLP
Employment & Labour Lawyers

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

Providing management with practical strategies that address workplace issues in proactive and innovative ways.

Management Counsel Newsletter: Six times a year our firm publishes a newsletter that addresses important topics in employment and labour law. If you would like to receive our newsletter but are not yet on our mailing list please send your *name*, *address*, *telephone* and *fax* numbers, and *email* address to info@sherrardkuzz.com

Employment Law Alliance®

Our commitment to outstanding client service includes our membership in ***Employment Law Alliance®***, an international network of management-side employment and labour law firms. The world's largest alliance of employment and labour law experts, ***Employment Law Alliance®*** offers a powerful resource to employers with more than 3000 lawyers in 300 cities around the world. Each ***Employment Law Alliance®*** firm is a local firm with strong ties to the local legal community where employers have operations. www.employmentlawalliance.com