

Workplace Law Bulletin

AIRD & BERLIS LLP
Barristers and Solicitors

You Asked, We Answered: Dealing with the Difficult Employee

By Michael Horvat

During our last webinar, we had a number of interesting questions on how to deal with a difficult employee. Below is a compilation of some of the most frequently-asked questions.

If an employee quits, and then changes their mind, do we have to accept them back to work?

An employee who quits has to demonstrate both subjective and objective intent to resign. Essentially, they must demonstrate by words and deeds that they no longer want to be employed at your company. But, an employee who cleans out their desk, without something further, or says “I’m done” without engaging in other actions that support a resignation, can effectively rescind their quit. While the employee could become subject to discipline for their actions (such as leaving work without approval), courts and arbitrators (and particularly the Ministry of Labour) have not held employees to a simple “quit” standard. Depending on the circumstances, judges and arbitrators will allow the employee to “cool off” and return to work. It is therefore always best to get a resignation in writing and send immediate written confirmation to the employee. Process exit paperwork and get confirmation from the employee about collecting/sending their personal belongings. Time is often the key factor. However, if steps are taken by the company to replace the employee, and the company could therefore face damages if the employee is permitted to rescind their resignation, the quit is more likely to be final.

The company is able to accommodate an injured worker, but in a position that is rated at a lower skill level and/or at a lower wage rate than their regular position. Which rate is applicable?

The general rule is that employees are paid at the rate attributable to the work that is being performed. Subject to the terms of a collective agreement, there is no obligation to “red circle” either wages or hours where the accommodated job duties attract a lower wage. Practical consideration should be given to maintaining the employee’s prior rate during short durations of work-hardening and/or to assist in the employee’s transition through an early return to work, particularly if the job duties are being reviewed and potentially changed as more information regarding the employee’s physical/mental capabilities is being disclosed. Remember, however, that the employee may be able to claim workers’ compensation or disability insurance coverage for the difference and “loss” incurred due the difference in wage rate paid in the accommodated position to that of their pre-injury/disability position.

If an employer suspects mental illness may be the cause or aggravating factor of an employee’s aggressive behaviour, but the employee consistently denies any condition, what are the employer’s obligations?

First, the employer is entitled to ask the employee whether there may be any reasons for the employee’s actions,

particularly if they are out of character. The employee can also be advised of an employee assistance program (if such service is made available by the company). The employee should be cautioned that, absent an explanation and non-culpable factors which may be affecting the employee's behaviour, the company will have no choice but to act to correct the behaviour, which could include discipline up to discharge. However, accommodation is a high bar and, ultimately, if the employee ceases his/her denial and discloses that his/her actions may be result of a mental illness, that employee maintains the protection of the *Human Rights Code* and the employer's duty to accommodate remains, even if termination has already occurred. Reinstatement to employment is both a remedy and an accommodation recognized under the *Code* and likely would have to be permitted (depending on the circumstances). Remember, too, that employers may be deemed to have "constructive knowledge" of a

mental health disability if the employee demonstrates signs that would lead a reasonable person to question whether or not there were mental health issues present. Aberrant behaviour (lashing out, arguing, aggressive actions) may all be considered signs which point to a mental health disability.

If you have questions regarding any aspect of workplace law, please contact any member of the Aird & Berlis LLP Workplace Law Group:

Lawyers:

| | | |
|---------------------|--------------|------------------------|
| Fiona Brown | 416.865.3078 | fbrown@airdberlis.com |
| Meghan Cowan | 416.865.4722 | mcowan@airdberlis.com |
| Michael F. Horvat | 416.865.4622 | mhorvat@airdberlis.com |
| Lorenzo Lisi | 416.865.7722 | llisi@airdberlis.com |
| Barbra H. Miller | 416.865.7775 | bmiller@airdberlis.com |
| David S. Reiter | 416.865.4734 | dreiter@airdberlis.com |
| Cynthia R.C. Sefton | 416.865.4730 | csefton@airdberlis.com |

AIRD & BERLIS LLP

Barristers and Solicitors

Brookfield Place
 181 Bay Street, Suite 1800
 Toronto, Ontario, Canada
 M5J 2T9

T 416.863.1500 F 416.863.1515

www.airdberlis.com

This *Workplace Law Bulletin* offers general comments on legal developments of concern to businesses, organizations and individuals, and is not intended to provide legal opinions. Readers should seek professional legal advice on the particular issues that concern them.

© 2017 Aird & Berlis LLP

This *Workplace Law Bulletin* may be reproduced with acknowledgment.