Focus

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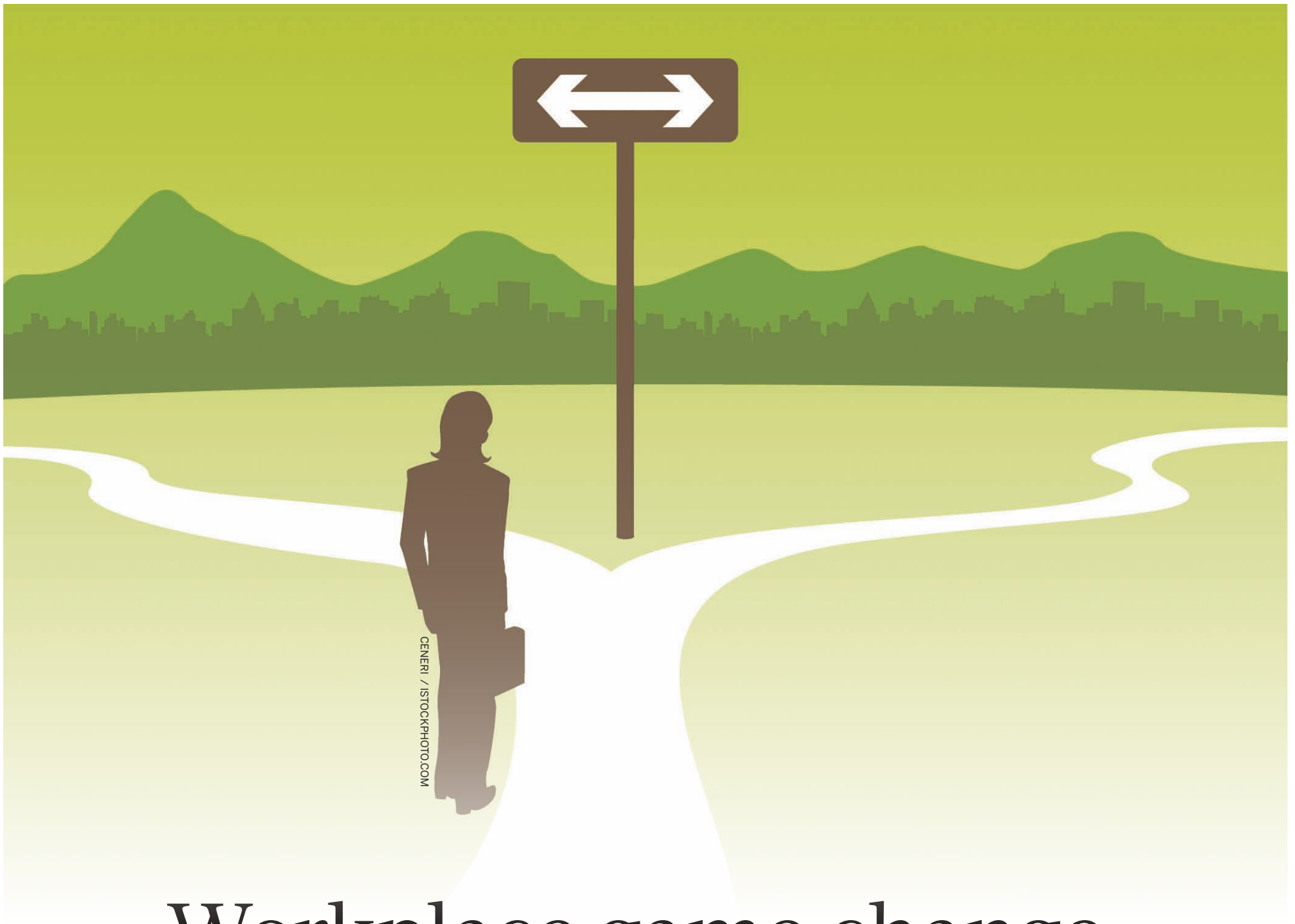

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Workplace game change

Human rights award in fired employee's civil claim highlights second option

Daniel Lublin
Ellen Low

Patricia Wilson's employment at Solis Mexican Foods Inc. was short-lived. But her claim that she was fired over an injury, which was the subject of a September Superior Court decision, should leave a long-lasting precedent in Ontario. Although Superior Court judges have had the authority for more than five years to award human rights damages in civil claims, it had never happened — until this case.

Wilson, a 54-year-old certified general accountant, took a desk job with Brantford, Ont.-based Solis Mexican Foods in 2010 as an assistant controller. She was later moved to an analysts' role. Presumably feeling secure about her job after her performance was rated by the company as "satisfactory or better," Wilson revealed that she was suffering from a bad back and feeling unwell. This was the beginning of the end — at least for her job. Five days after Wilson disclosed her injury, a group of Solis decision-makers met, including the human resources manager and chief operating officer, and debated her health. Despite recently finding that her work was acceptable, they suddenly concluded that her job was in doubt, finding that it was "time to consider that [Wilson] may not be suited to [Solis]." The company's sudden change of heart became a crucial piece of evidence at the trial before Superior Court Justice Duncan Grace, who was tasked with deciding whether to award human rights damages as part of a civil claim, although no judge in Ontario had previously done so before.

When Wilson's back condition did not improve, she left work and went to see her doctor who sent Solis a medical note cryptically stating only that she needed to be off work until further notice for medical reasons. No other details were provided. Solis responding by demanding more information from Wilson, who eventually sent another doctor's note stating that she could gradually return to work over the course of a couple of weeks but that she would need to sit, stand and walk around in order for her back condition to improve. However, Solis refused to permit Wilson to return to work until she was able to return to full-time hours and it refused to agree to her doctor's request that she not remain sedentary in her role. As a result, Wilson never returned.

In the meantime, Solis sold one of its divisions, claiming that the divestiture eliminated the need for Wilson's role. It then sent Wilson a letter stating that the sale made her redundant and it terminated her job. But Wilson was not about to go quietly. She sued Solis in the Ontario Superior Court of Justice for both wrongful dismissal and discrimination and the matter proceeded to a summary trial late last year.

At trial, Justice Grace had little difficulty finding that Wilson was wrongfully dismissed and awarded her three

Discrimination, Page 13

Focus LABOUR & EMPLOYMENT

Diagnosing the need for doctors' notes

Stuart Rudner

"Stop asking employees for sick notes, OMA head urges." That was the recent headline in the *Globe and Mail* that prompted confusion and controversy among both employers and employees. In response to the Ontario Medical Association press release, public opinion has ranged from the notion that employers should be free to require doctor's notes for every absence, to the position that employers should never do so.

The press release, read in its entirety and context, should not be taken as a blanket prohibition on employers asking for doctor's notes; it was explicitly made in the context of flu season and references the highly contagious nature of the flu. The point seems to be that it is not in the public interest to force an individual with a highly contagious illness to attend at a medical office where they might infect others.

Legally, the OMA statement opened a fresh debate on how employers are to control employee absences due to illness. Like every legal issue, there is no right or wrong. Not all employees abuse their entitlement to sick days, and not all employers harass employees when they call in sick. However, absenteeism is a legitimate issue for employers; the fundamental basis of the employment contract is that the employee agrees to attend at work, for which they will be paid. Unfortunately, we have all heard of employees that take "mental health days" when they don't feel like working, or call in sick to get a head start on the long weekend.

A few years ago, I was fortunate enough to represent the Human Resources Professionals Association (HRPA) when they sought intervener status before the Supreme Court of Canada in the landmark case of *Keays v. Honda Canada Inc.* In his judgment, the trial judge was highly critical of Honda's requirement that Keays provide doctors' notes to justify his absences from work, and he awarded $500,000 in punitive damages. The wording of the trial decision suggested that requiring an employee with a disability to provide a doctor's note was prima facie unlawful.

On behalf of the HRPA, I sought clarity from the Supreme Court with respect to when employers can require medical documentation in support of workplace absences. We put forward the position that not all of a disabled employee's absences will be disability-related, and that employers need to be able to identify those which are in order to accommodate them. Conversely, those absences which are unrelated to disability are not entitled to accommodation and should be treated in the same manner as absences of employees without disabilities.

Our submissions included the following:

- Absenteeism results in substantial cost to employers.
- Absences from work that are not pre-authorized can be divided into two broad categories: innocent or non-culpable absences (e.g., disability-related absences as a form of accommodation); and blameworthy or culpable absences (e.g., unauthorized or unexplained absences due to factors within the employee's control).
- Culpable absenteeism may be grounds for discipline, up to and including termination.
- Employers are not doctors and cannot necessarily assess the legitimacy of a medical absence on their own.
- Canadian arbitrators and courts have recognized the right of employers to establish bona fide measures to ensure employee's regular attendance.

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Our request was a moderate one, as set out in our factum: "Rather than an absolute and over-inclusive rule, either always precluding or always permitting the requirement of doctors' notes, [the requirement for doctors' notes] should be based upon the specific circumstances of each case, so that there can be a proper balancing of the rights and duties of all parties involved."

Though the court's decision is largely known for other reasons, including its impact on what I refer to as *The Damages Formerly Known as Wallace*, the court affirmed that "the need to monitor the absences of employees who are regularly absent from work is a *bona fide* work requirement in light of the very nature of the employment contract and responsibility of the employer for the management of its workforce." The court went on to hold that Honda's doctor's-note requirement was part of its accommodation process, essentially allowing it to identify disability-related absences and exempt them from discipline.

Ultimately, every situation must be assessed based upon its own particular facts. The rights of both parties have to be respected, so that employers are not short-changed by dishonest employees and sick employees are not harassed by their employer. In *Keays,* the Supreme Court accepted our moderate request and confirmed that employers in Canada have a legitimate right to manage absenteeism. In so doing, employers should adopt and disseminate clear policies in this regard, so that everyone understands their rights and obligations. Employers should not unduly limit their rights; many organizations have policies which require doctor's notes for "absences of three or more consecutive days." As I often say, what about the employee that routinely calls in sick on Fridays before long weekends, or is "suddenly" ill on a day that had been requested but denied as a day off? If the employer-drafted policy only allows them to require medical documentation for absences of three days or more, then their recourse may be restricted. Whatever the policy, employers should ensure that their employees are aware of the terms and that they are routinely and fairly enforced.

Stuart Rudner is a founding partner of Rudner MacDonald, specializing in Canadian employment law, and is the author of You're Fired! Just Cause for Dismissal in Canada. Reach him at srudner@rudnermacdonald.com or 647-255-3100. Follow him on Twitter @CanadianHRLaw.

Discrimination: Could be a new frontier in labour law

Continued from page 10

months' severance pay, despite her short service. The real issue, however, was whether Wilson's bad back played any role in Solis' decision to terminate her. Justice Grace found that it was a "significant reason," completely rejecting Solis' argument that its corporate restructuring made Wilson's role unnecessary. Based on the fact that her performance was seen as adequate until she fell ill, Justice Grace stated that Solis' efforts to reinstate her were disingenuous at best and that its requests for better medical evidence was really just a "run around," buying itself time until it sold off a division. When the sale went through, Solis "had the excuse it needed to rid itself [of Wilson] once and for all," according to Justice Grace in *Wilson v. Solis Mexican Foods Ltd.* [2013] O.J. No. 4271. Wilson was awarded $20,000 in non-taxable general damages for human rights violations — on top of her severance award.

Ontario's Superior Court judges have had the power to award human rights damages since 2008, when amendments were made to the *Human Rights Code*, so long as those damages were tied to some other civil cause of action, such as a wrongful dismissal claim for severance. Before then, employees who alleged their terminations were discriminatory had to pursue their wrongful dismissal claims in court and simultaneously bring a human rights claim in a separate proceeding. Now, both claims can be heard together by a judge.

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The ruling in this case paves the way for more employees to pursue discrimination claims in court instead of at the Human Rights Tribunal, where they cannot recover legal fees when successful. Further, unlike traditional employment law damages that are based on an employee's age, tenure and position, human rights awards are unpredictably based on what the judge thinks is fair. This could lead to disproportionately large damage awards and spur more "human rights litigation" which may just become the next frontier of employment claims in court.

Daniel Lublin and Ellen Low are employment lawyers at Whitten & Lublin in Toronto. They act for both employees and employers in all aspect of workplace law, with an emphasis on litigation (www.toronto-employmentlawyer.com).