Reaching Out

Reaching Out – Second Edition

Date: December 17, 2012

Dear Friends,

Happy Holidays!

Since our first edition of *Reaching Out* this past summer, the fall has managed to fly by and we find ourselves already gearing up for the holiday season.

We hope you found our first edition of our social services update informative and we always appreciate your feedback. In our Winter edition, we highlight three common issues faced by employers. One of the most common human resources issues that employers struggle with on a daily basis is the management of attendance and absenteeism in the workplace. Although an issue that is often layered in various degrees of complexity, some basic principles are helpful to review. In this edition, Mireille Khoraych provides a refresher on the challenges faced by employers in dealing with this issue and, as well, on the implementation of attendance management policies.

Do you tweet and how many “followers” do you have? Do you “like” or “connect with friends” on social media? The increasing use of social media by individuals and the public access and nature of the medium raises particular challenges where an employee comments publicly on confidential or sensitive workplace-related information, or comments negatively on individuals in the workplace or in such a way as to negatively impact the reputation of the employer. Michelle A. Alton reviews the emerging issue of social media and related disciplinary issues in the workplace.

Many agencies in the social services sector collaborate in the provision of services so as to maximize the expertise and efficiencies of like-minded organizations. You may not be aware of the labour and employment issues that may arise from such shared service arrangements and which are often overlooked in designing the shared service arrangement. In our final article, Laila Karimi Hendry discusses these important issues, including the impact of the related and common employer doctrines.

As always, we hope that this newsletter is informative and engages your interest. We extend our best wishes to you during the holiday season and we will see you again in the Spring with the third edition of *Reaching Out*.

Lauri A. Reesor
Editor

IN THIS ISSUE

- Attendance Management Refresher
- Inappropriate Off-Duty Use of Social Media
- Considerations for Organizations Engaging in Shared Services

ATTENDANCE MANAGEMENT REFRESHER

By: Mireille Khoraych

Managing employee attendance at work can often be difficult, requiring the balancing of multiple interests. On the one hand, there is the employer's need to have employees attend at work with regularity and predictability. On the other hand, there is the recognition that employees are not always able to attend at work, often for reasons beyond their control. Although not a new issue, the complexity of managing employee absences remains a challenging, yet common, every day problem. For this reason, we've included an attendance management refresher in this issue of *Reaching Out.*

YORK UNIVERSITY AND YORK UNIVERSITY STAFF ASSOCIATION, 2012 CANLII 41233 (ON LA)

In a case decided earlier this year, Arbitrator Surdykowski reviewed an employer's Attendance Management Program ("AMP") in the context of a policy grievance filed by the Union. The Union alleged the AMP on its face was unreasonable and discriminatory and ought to be struck down. In upholding the AMP, Arbitrator Surdykowski confirmed a number of general principles that apply to AMPs, including the following:

- Employers have a legitimate interest in monitoring and controlling both culpable and non-culpable absenteeism;
- Unless the collective agreement provides otherwise, the employer is within its management rights to establish an AMP without discussion or other consultation with the union; however this right it not unfettered;
- An AMP will be invalid to the extent that it conflicts with the collective agreement or applicable legislation, such as the *Ontario Human Rights Code* or the *Occupational Health and Safety Act*;
- An AMP must not be structured or applied in a manner that is arbitrary, discriminatory or in bad faith;
- An AMP must be structured and administered reasonably—that is, in a manner which considers both employer and employee collective agreement and statutory rights, and legitimate interests;
- An AMP must include sufficient flexibility and discretion to permit it to be administered with consistent fairness and due regard for individual circumstances;
- An absence from work without medical or other justification is culpable. It constitutes just cause for progressive discipline up to and including discharge in an appropriate case;
- An absence from work beyond the employee's control, such as illness or injury, is non-culpable and does not justify a disciplinary response;
- Even innocent absenteeism can result in termination of employment at the employer's discretion where certain conditions are met. An employer may terminate an employee's employment when the employee has been unable to attend work with reasonable regularity and there is no reasonable prospect that the employee will be able to do so in the foreseeable future, even with available accommodation to the point of undue hardship. This is the case whether or not excessive absenteeism is due to a compensable or non-compensable disability, and whether or not the employment relationship is governed by a collective agreement;
- Misleading employees with a threat of termination so that they will come to work even when they are too ill to do so is not permissible. However, there is nothing wrong with advising employees that their employment may be terminated for culpable or non-culpable absenteeism, including the failure to achieve a reasonable degree of attendance because of illness; and
- It is permissible to establish a threshold for entry into an AMP. There must be a rational basis for an AMP threshold, but there is nothing *prima facie* unreasonable about a triggering threshold that applies across all of an employer's occupational groups, whether or not tailored or tied to an average or other rate of absenteeism within any of the employer's occupational groups.

With respect to York's AMP specifically, Arbitrator Surdykowski found it was a reasonable and proper policy on the basis that:

- It specifically recognized that its application is subject to the collective agreement (including the right to union representation), the *Employment Standards Act*, the *Workplace Safety and Insurance Act*, and to York's obligations under the *Human Rights Code*;
- It emphasized flexibility and discretionary individualized treatment at every step;
- It applied to both non-culpable and culpable absenteeism, but divided them into separate streams with appropriately different considerations and identified potential employment consequences; and

- The threshold for entry was reasonable and relatively generous, being set at double the actual average rate of absences, and would be reviewed annually.

Arbitrator Surdykowski disagreed with the Union's argument that it was improper for the AMP to provide that employees may be terminated for other than disciplinary just cause. He also disagreed that the AMP could operate to intimidate or coerce employees into not exercising collective agreement or statutory rights on the basis that the AMP excluded collective agreement and statutory leaves of absence other than sick leave. In addition, the Arbitrator found it was not problematic that absences due to non-work related disability were not excluded.

It should be noted that this decision reviewed the employer's AMP in general terms, and not its application to any particular employee. In all cases, it is imperative to ensure that an AMP is applied reasonably and in a non-arbitrary manner Although an AMP may be found to be valid in the abstract, its application to any particular employee may prove problematic if the AMP is not properly followed.

ATTENDANCE MANAGEMENT POLICIES — GUIDELINES

As with other workplace issues, it is best to start with a clear policy setting out your expectations of employees. Strong AMPs require that employers adhere to some basic principles:

- Ensure the policy is in writing and that it is clear and easy to understand;
- Distinguish between culpable and non-culpable absences (as further outlined below);
- Ensure employees are aware of the policy and your expectation that they attend work on a regular basis and the standard for attendance in your workplace;
- Employees should be made aware of their obligation to attend work, to advise in advance if they are unable to attend and to provide supporting documentation of medical or emergency-related absences;
- The policy should set out the procedure that will be followed to address increasing levels of culpable absenteeism;
- The policy should be applied fairly and consistently;
- However, the policy should not lead to any automatic outcomes and should not be applied mechanically. Rather, the policy must permit the exercise of discretion at each step and each case assessed individually;
- An employee's placement and progression in the program should be based on both the number of occurrences and the number of days of absence—this more accurately reflects the impact of an employee's absence on the workplace;
- Ensure medical information requested under the policy is reasonable and commensurate with the circumstances — do not overreach;
- The policy should be consistent with any applicable collective agreement;
- The policy dealing with innocent absenteeism should not be disciplinary in nature; however, employees who do not cooperate with the employer's efforts to obtain medical information and/or provide accommodation may be subject to discipline for breaching their obligations under the policy.

INAPPROPRIATE OFF-DUTY USE OF SOCIAL MEDIA

By: Michelle A. Alton

The utilization of social media has grown exponentially in the past few years. In light of this, employers have more reason than ever to consider how to effectively manage employees utilizing social media sites to limit potentially negative effects in the workplace. This is especially true for employers whose employees routinely work with confidential and sensitive information, and could potentially use social media to publish such information.

WHEN IS DISCIPLINE FOR INAPPROPRIATE OFF-DUTY USE OF SOCIAL MEDIA WARRANTED?

In the context of an employment relationship, social media issues can arise in one of two ways: first, issues may arise if and

when employees utilize social media sites while they are at work; and second, issues can arise when employees utilize social media sites inappropriately **outside** the workplace. In general, employers can only regulate off-duty conduct when it can be shown that the conduct will have a negative impact on the employer's interests, and/or the workplace in general.

Off-duty conduct will be considered to negatively affect an employer's interests in the following circumstances:

> The conduct in question detrimentally affects the employer's reputation and/or is considered a breach of confidentiality;
> The conduct adversely affects the employee's ability to discharge his or her duties and responsibilities; or
> The conduct affects the employment rights of other employees.

If an employee's social media activity affects an employer in any of these three ways, some sort of discipline will generally be warranted.

For example, in *Chatham-Kent (Municipality) v. C.A.W. Canada, Loc. 127,* (2007), L.A.C. (4th) 32, Arbitrator Williamson upheld the termination of an employee of a long-term care facility who had posted private information about residents (including pictures) and made disparaging comments about her employer on a website that she had created. The website was accessible to anyone with Internet access. The employee had worked for the employer for approximately eight years and on two occasions had signed Confidentiality Agreements. The employer terminated the employee for breach of the Confidentiality Agreement, insubordination and conduct unbefitting a Personal Care Giver. Arbitrator Williamson upheld the termination on all of these grounds. Relevant to his determination was the serious nature of her misconduct, which included violating the Confidentiality Agreement that she had signed, and the fact that the employee had been previously disciplined for similar behaviour.

More recently, in the decision of *Bell Technical Solutions v. Communications, Energy and Paperworkers Union of Canada*, 2012 CanLII 51468 (ON LA), Arbitrator Chauvin considered the appropriate discipline in a case where three employees had posted inappropriate comments on the social media site, Facebook. The Arbitrator provided a detailed overview of the general arbitral principles relating to employee discipline or discharge for inappropriate use of social media sites.

In that case, all three of the employees involved were employed by Bell Technical Solutions ("BTS") as Technicians. Two of the employees, referred to as Mr. A and Mr. S in the decision, were regular part-time employees. The third employee, Mr. W, was a temporary part-time employee. At the time that the discipline was imposed, Mr. A had worked for the employer for 9.5 years and was 41 years old. Mr. S had worked for the employer for 7.5 years and was also 41 years old. Mr. W had worked for the employer for 18 months and was 20 years old.

All three of the employees were warned to stop posting the inappropriate comments on Facebook, but failed to do so. During the initial discipline meetings, Mr. W and Mr. A were unapologetic and defiant. As a result, BTS terminated their employment because of the offending Facebook comments made about BTS and/or their supervisor, Mr. B. Mr. S was more reasonable in the discipline meeting, and as a result, BTS chose to suspend him for five days.

Arbitrator Chauvin upheld the five-day suspension of Mr. S and the termination of Mr. W. He substituted the termination of Mr. A with a one-year disciplinary suspension without pay.

In making his decision, Arbitrator Chauvin noted the following:

- It is well-established that inappropriate Facebook postings can result in discipline or discharge, **depending on the severity of the postings.** The nature and frequency of the comments must be carefully considered to determined how insolent, insulting, insubordinate and/or damaging they were to the individual(s) or the company.
- When determining the appropriate disciplinary measure, it is important to consider the following factors: whether the individual was uncooperative, defiant, and/or dishonest during the employer's investigation and whether the individual admitted to engaging in misconduct, accepted responsibility, showed remorse and/or offered a genuine apology.

- Provocation, which could include inappropriate behaviour by a manager, can be considered as a significant mitigating factor.

It is clear from a review of these two decisions that depending on the circumstances, significant discipline can be imposed when social media is utilized in an inappropriate manner outside of the workplace. When assessing the appropriate disciplinary penalty, employers must consider all of the factors articulated above, particularly how serious the misconduct was and whether any other duties and/or policies have been violated. All allegations should be put to each employee, and notes should be made about the employee's behaviour during the investigation. Any possible provocation in the circumstances should also be assessed, as this can be a mitigating factor.

BEST PRACTICES

In order to effectively manage employee social media use as it may impact on the workplace, it is critical that employers develop and consistently enforce policies and procedures regarding social media use, as well as confidentiality.

Employers should therefore ensure they have a social media policy in place that includes:

- A direction regarding social media use in the workplace: it should be clear to employees whether they are permitted to access social media sites during working hours on their work computers.
- A statement that posts on social media sites will not be considered private, even if a posting is made to a limited number of "friends." Employees should also understand that if they chose to identify themselves as an employee of a particular employer, they must represent themselves and the employer appropriately.
- A rule that prohibits employees from speaking on the employer's behalf without permission, and a rule that requires employees to use a disclaimer when publishing communications that may be perceived as the employer's communication.
- Guidelines as to posts that will be considered acceptable, and those that will be considered inappropriate. Examples of inappropriate posts include disclosing personal information of clients, posting confidential company information, and/or posting disparaging comments about the employer or other employees.
- A statement that any violations of the policy may be grounds for discipline, or, in appropriate circumstances, grounds for termination.
- A provision that employees should be encouraged to ask questions regarding the policy.

The employer's Social Media Policy should also coincide with and support an employer Confidentiality Policy that all employees are required to sign, ideally upon hire. The Confidentiality Policy should clearly set out what information is considered confidential, and in what circumstances (if any) an employee may disclose this confidential information. As well, it should include the possible disciplinary consequences if the policy is breached. This type of policy is especially important for employers which employ individuals who have access to sensitive and confidential client information. In summary, it is important to have strong social media and confidentiality policies in place, so that employees will not only know what their obligations are, but so that they will understand that inappropriate utilization can lead to significant disciplinary consequences.

CONSIDERATIONS FOR ORGANIZATIONS ENGAGING IN SHARED SERVICES

By: Laila Karimi Hendry

Many agencies in the social services sector collaborate in the provision of services so as to maximize the expertise and efficiencies of like-minded organizations. Examples of such shared services include having an employee of one organization working very closely with other organizations, having a number of employees from different organizations working together for a particular project, or creating a new position for a project jointly funded by a number of organizations.

In circumstances of such shared services where the controlling entity is unclear or unions are involved, organizations should

be cognizant of the potential employee issues. This article seeks to highlight some of those issues for your consideration when engaging in shared services in both the employment and labour relations contexts.

LABOUR RELATIONS CONSIDERATIONS

Prior to entering into a shared services arrangement, employers should determine whether there are collective agreement implications and legislative restrictions.

If the shared service function is to be performed by employees covered under a collective agreement, the parties should determine whether the collective agreement contains restrictions on the organization's ability to contract out the work. Even when dealing with a collective agreement that has few restrictions on contracting out bargaining unit functions, employers should consider whether the contracting out would result in a surplus of bargaining unit employees who may or may not be laid off. For example, some social service agencies have collective agreement language that allows work to be contracted out if it does not result in a bargaining unit member being laid off. If one of the main reasons for entering into a shared services arrangement is for the participating agencies to increase efficiency, the advantage to a shared services arrangement that precludes lay-offs may be limited.

Whenever a unionized employer arranges for another employer to perform its bargaining unit work, it must be sensitive to the possibility of a sale of business or related employer application being made pursuant to the *Labour Relations Act*, 1995 ("*LRA*"). These mechanisms are designed to prevent employers from engaging in union avoidance through the movement of bargaining unit work from unionized entities to non-unionized entities. Section 69(2) of the *LRA* states:

Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

The *LRA* defines the word "sells" as including leases, transfers and any other manner of disposition. As such, if enough assets and other elements of an employer's operations are transferred to a third party service provider organization, the Ontario Labour Relations Board may find that a sale of part of that employer's business has taken place and declare that the bargaining rights of the union and the collective agreement apply to the third party.

There is also the possibility that the third party organization may be found to be a related employer. Subsection 1(4) of the *LRA* states:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

Therefore, the more direction and control which an employer exercises over a third party service provider's operations, whether through its Board of Directors or otherwise, the greater the risk of a related employer declaration and the potential extension of the bargaining rights and collective agreement of that employer to the other third party agency.

EMPLOYMENT LAW CONSIDERATIONS

When entering into a shared services arrangement in a non-unionized environment, employers should be aware of the

common employer doctrine, which was recently explained by the Ontario Superior Court in *Kingston et al. v. GMA Cover Corp. et al* 2012 ONSC 5019 at paras. 50, 53:

In my view, the purpose of the common law doctrine is similar to the underlying purpose behind the statutory provisions: to protect the legitimate rights of employees when there is uncertainty as to who the real employer is, or where a business is carried on through more than one entity. Employees have no control over corporate structures, or who makes decisions regarding their employment terms and conditions. […]

Fundamentally, the issue boils down to where decision-making about employment matters resides. Control is thus important, but not definitive. Many subsidiary corporations make their own employment decisions. However, where employment decisions are made by the parent company for a number of subsidiary corporations, and they are operated as a business unit, it may be quite appropriate to treat them as one employer. Employees have no control over corporate transactions or relationships, and generally speaking they have no knowledge as to who makes employment decisions.

In a shared services agreement, it is important to clearly outline the role and responsibilities of each involved organization. Otherwise, there is a risk of a determination that all of the organizations involved in the shared service are common employers with the result that each of the participating organizations-regardless of size, scope or financial stability-could be jointly and severally liable to the employees involved in the shared service for all the responsibilities of an employer.

FUNDAMENTAL ELEMENTS OF A SHARED SERVICES AGREEMENT

If different organizations are collaborating to provide shared services, the practical issues will be determining which entity will administer and govern the shared service, who will have ultimate liability for the employee, and how the other participating entities can ensure that each of their specific needs are met, particularly with respect to quality, meeting deadlines, compliance with applicable standards and legislation, consistency with strategic plans, and maintenance of best practices.

To protect the interests of all agencies involved-particularly those relinquishing autonomy over a function-it is important to have a very specific shared services agreement that includes provisions which address the following questions:

- What are the goals, objectives and purpose of the shared service?
- Who has effective control over decision-making for the shared service?
- How does each participating organization contribute to the shared service?
- What mechanisms are in place to assure quality and compliance with standards, policies and legislative requirements?
- What is the scope of the shared service to be provided (including geography)?
- Who will perform the work (e.g. an employee from one organization, a new hire, employees from different organizations engaged in job-sharing, need for particular background/experience)?
- What are the terms and conditions of employment? Will the work be performed under a collective agreement?
- What is the impact on the bargaining unit, if applicable?
- Which organization will be the employer of the employees and responsible for compliance with the *Employment Standards Act, 2000, Pay Equity Act, Occupational Health and Safety Act, Workplace Safety and Insurance Act* and other legislation?
- What mechanisms are in place to protect the privacy of confidential client and employee information and to ensure that any applicable privacy legislation is complied with in sharing that information with the service provider?
- What is the duration of the shared service? How can it be extended? How can a participating organization exit the relationship?
- When and how is the performance of the shared service to be measured or evaluated?
- Are there any other considerations unique to the arrangement that should be addressed?

Should you have questions or require assistance with any of the issues discussed in this edition of *Reaching Out*, please contact your regular Hicks Morley lawyer.

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