Reaching Out

Reaching Out – Fourth Edition

Date: November 1, 2013

Dear Friends,

It is that time of year again, and after a summer hiatus and a relatively warm fall there is no doubt the air now feels a little crisper and autumn is in full swing. This weekend we gain an extra hour (theoretically at least) as the clocks fall back and it is our hope that with your "extra hour" you find a moment to recline and read and catch up on the new issues discussed in our Fall Edition of *Reaching Out*.

The Fall Edition of *Reaching Out* focuses on practical issues and emerging trends that many of you in the social services sector are faced with on a regular, if not daily, basis. This year saw the release of two landmark decisions of the Federal Court that will impact the accommodation of childcare and eldercare requests in the workplace. Formerly, family status claims received little attention in the jurisprudence; however, an emerging trend in the case law is developing as requests increase from employees for the accommodation of childcare arrangements, and, with the aging of the boomer population, eldercare requests. Are you required to accommodate these requests? Andrew Zabrovsky discusses the impact of these two decisions and the importance of engaging employees to ensure you meet not only your substantive accommodation obligations but also your procedural duties.

Our next article is focused on the latest developments coming out of the Ministry of Labour with respect to the implementation of Bill 168 and the requirement for employers to have developed violence and harassment policies and procedures. Are you keeping up with your annual reviews? Craig Lawrence speaks about the latest cases, Ministry of Labour blitzes and recommendations for best practices in your workplace.

Stress is a common factor in many workplaces, and even more so for many social service agencies where resources are stretched and employees are often dealing with difficult and challenging situations. Absenteeism and sick leave rates tend to be high in the sector but what if you suspect that an employee is abusing his or her entitlement to sick leave? Amanda Lawrence's article discusses a number of recent helpful decisions, and the practical implications, for employers in detecting and taking disciplinary action for abuse of sick leave.

Finally, in a sector where resources are limited, many agencies have to rely on volunteers or the use of unpaid "interns" in order to operate. The issue of the use of unpaid interns and volunteers can be a controversial one from a legal perspective. Widespread media attention this summer on the use of interns by Canadian employers illustrates the complexity of the issue and the frequent misunderstanding of the law by employers regarding the permissible use of volunteers. In her article, Kathryn Meehan of our Waterloo office highlights the issues surrounding the use of volunteers and unpaid interns and the risks that may be associated with their use in the workplace.

As always, it is our hope that you find the Fall Edition of *Reaching Out* informative and useful in your daily human resources operations. If you have ideas for future editions, please do not hesitate to contact me, at lauri-reesor@hicksmorley.com. I look forward to hearing from you.

Lauri A. Reesor
Editor

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DEVELOPMENTS IN HUMAN RIGHTS “FAMILY STATUS” PROTECTION: CHILDCARE AND ELDERCARE

By: Andrew N. Zabrovsky

Traditionally, the employer’s duty to accommodate under the Ontario *Human Rights Code* and the *Canadian Human Rights Act* has developed through jurisprudence flowing from the obligation to accommodate disabilities. However, we are now seeing a growing trend in accommodation cases addressing an emerging issue for employers grappling with ever-increasing requests from employees to accommodate childcare and eldercare needs. What are the obligations for employers faced with such requests? Recently, both the courts and the tribunals have weighed in.

FAMILY STATUS ACCOMMODATION AND CHILDCARE

Earlier this year, two decisions of the Federal Court drew significant attention by addressing questions about an employer’s obligations to provide family status accommodation where an individual’s work schedule conflicts with his or her childcare obligations. These two decisions – *Johnstone v. Canada*[1] and *Seeley v. Canadian National Railway*[2] – and the attention they have received in the media and from employee advocate groups have led many to believe that there has been a significant shift in this area of law. While that view may not be totally correct, it is true that these decisions mark another important development in this area of law and they can assist employers to better understand their obligations and responsibilities when it comes to family status accommodation.

THE *JOHNSTONE* CASE

In *Johnstone v. Canada* the applicant and her husband both worked for the Canada Border Services Agency (“CBSA”) at Pearson International Airport. The CBSA operates 24 hours a day, seven days a week, with employees working rotating shifts. After giving birth to her second child, the applicant requested family status accommodation in the form of three fixed daytime shifts per week of 13 hours each. These shifts would allow her to oversee her childcare obligations and maintain full-time employment status (as well as pension and benefits entitlements). This request was denied. Further, in accordance with an unwritten policy that employees seeking accommodation for childcare arrangements had to go to part-time shifts, she was offered a part-time arrangement. The applicant complained to the Canadian Human Rights Commission, and after her complaint was upheld, the CBSA applied to the Federal Court for judicial review.

THE *SEELEY* CASE

In *Seeley v. Canadian National Railway* the applicant was employed by CNR as a freight train conductor in Jasper, Alberta. The applicant had two children and her family lived approximately 100 kilometres from Jasper. She was laid off for eight years, during which time she accumulated seniority and performed emergency work for the company.

Under the applicable collective agreement, CNR had the ability to recall employees to positions across its national organization. In 2005, CNR experienced a conductor shortage at its Vancouver terminal, and recalled the applicant to work in Vancouver. The applicant requested that she be relieved from this obligation as she could not find full-time childcare in Alberta for her children in order for her to report to Vancouver. CNR did not respond to her request for relief, and informed her that if she did not report to work her employment would be terminated, which is what occurred. The applicant then filed a complaint with the Canadian Human Rights Commission. That complaint was upheld, and CNR sought judicial review.

THE FEDERAL COURT’S DECISIONS IN *JOHNSTONE* AND *SEELEY*

The Federal Court upheld the decisions of the Canadian Human Rights Tribunal in both the *Johnstone and Seeley* cases, and in doing so confirmed that the protection from discrimination in employment on the basis of family status includes protection of needs arising from a parent's obligation to care for his or her children. Notably, the Federal Court found that the need for family status accommodation would be triggered where there is a conflict between a work obligation and a "substantial" parental obligation. While the Court did not define the term "substantial parental obligation", both cases suggest that there are some childcare requirements that would not be sufficient to meet this standard. However, in these cases, the childcare obligations were so clear and substantial that there was no doubt that they met the threshold for requiring some form of accommodation.

In particular, the *Johnstone* situation could be considered the "perfect storm" of circumstances where some form of accommodation would be necessary. Both parents worked rotating shifts, making arrangements for childcare almost completely unpredictable. The fact the applicant would have to give up her entitlements to pension and health benefits in order to access a shift that would accommodate her childcare obligations was clearly differential treatment in employment, contrary to the *Canadian Human Rights Act*.

Although the facts in both cases are fairly extreme, the *Johnstone* and *Seeley* decisions make it clear that the employer's process in assessing the needs for accommodation will be just as important as whether accommodation is actually possible. While the *Johnstone* and *Seeley* decisions do reinforce the idea that employers will be required to engage in meaningful discussions with their employees about their childcare needs and how those *needs* may be accommodated, the decisions also make it very clear that there is an obligation on the employee to make efforts to reconcile work and parental obligations before seeking accommodation. As with all accommodation requests, there is a requirement that the employee cooperate in the process. It is also key to remember that accommodation need only be provided to address an employee's childcare *needs*, and not the employee's preferred work-life balance. It is important for employers to have open, clear communications with employees seeking workplace accommodation so that these *needs* can be understood and addressed if possible.

Ultimately, the final word on the extent of an employer's duty to accommodate an employee's childcare needs remains to be written. Both the *Johnstone* and *Seeley* decisions have been appealed, and the findings of the Federal Court may ultimately be upheld, varied, or overturned entirely. Please stay tuned for future updates in *Reaching Out* or other Hicks Morley publications.

FAMILY STATUS ACCOMMODATION AND ELDERCARE

With the baby boomer generation nearing closer and closer to retirement, many employers are confronted with issues surrounding replacing an aging workforce and the intricacies arising from the end to mandatory retirement. In the background, however, the issue of eldercare has become a concern for employers, as younger employees now have to deal with the conflicts that may occur in the workplace as a result of having to take care of aging parents.

Any doubts as to whether eldercare would be captured by the protected ground of family status was put to rest by the Human Rights Tribunal of Ontario in August, 2012 with its decision in *Devaney v. ZRV Holdings Limited*.[3] In that case, the applicant worked as an architect for his employer in Toronto for approximately 27 years. For the last 13 years of his employment he lived with his mother in Burlington. His mother suffered from osteoarthritis and osteoporosis, and required a number of surgeries that, over time, caused her medical condition to deteriorate to the point where the applicant was responsible for her full-time care.

Between 2007 and 2008 the applicant was absent from the workplace on a number of occasions, claiming that he needed to take care of his mother who had ruptured her quadriceps muscle and was in and out of hospital care. The applicant used vacation days to cover some of these absences, and claimed to have worked from home on the other days. Ultimately, after issuing several warnings to the applicant, the employer terminated his employment due to his absenteeism.

The Tribunal found that the decision to terminate the applicant's employment was discriminatory, as it was related to the

applicant's family status protection under the *Human Rights Code* ("*Code*"). The Tribunal emphasized that, once an employer becomes aware that an employee has needs related to family status, the employer has a proactive duty to make inquiries about those needs to determine its accommodation obligations:

[B]eing aware that the applicant had eldercare responsibilities, the respondents had a duty to consider and explore the possibilities of accommodating the applicant's needs relative to his eldercare responsibilities. When a respondent is notified that an individual has *Code*-related needs, the respondent has a duty to make meaningful inquiries about the needs to determine whether or not a duty to accommodate exists. [4]

Ultimately, the Tribunal found that the employer in this case had failed both its procedural and substantive duties to the applicant: it failed to consult with him about his eldercare needs and it failed to provide any evidence establishing undue hardship that would prevent it from providing the applicant with some form of accommodation.

CONCLUSION

The issue of family status accommodation, both in instances of childcare and eldercare, is one which continues to develop and will certainly be affected by upcoming decisions from the appellate courts. However, there is no doubt that employers continue to have an obligation to communicate with their employees when family status issues arise and to work with them to try to find solutions which will allow them to attend work and meet their family needs. Likewise, there is an obligation on the part of the employee to self-accommodate and look for potential solutions before seeking help from his or her employer. Ultimately, family status accommodation, like any form of accommodation, is one which must be approached on a case-by-case basis with a degree of leniency and a modicum of common sense.

BILL 168 THREE YEARS LATER

By: Craig R. Lawrence

Bill 168 came into force on June 15, 2010, and introduced a variety of amendments to the *Occupational Health and Safety Act* ("the Act"). These amendments were intended to codify an employer's obligation to prevent workplace violence and harassment against its workers.

More recently, in February and March 2013, the Ministry of Labour conducted its first dedicated inspection blitz focusing on the enforcement of the workplace violence protection requirements introduced by Bill 168. As a result of the Ministry's blitz and recent arbitral decisions, employers are gaining a better understanding of how best to protect employees and fulfill their obligations to prevent workplace violence under the Act. The following discussion provides a refresher on Bill 168, a review of results from the Ministry's recent blitz, and recommendations for best practices moving forward.

BACKGROUND: BILL 168 AND PREVENTION OF WORKPLACE VIOLENCE

Bill 168 mandates that employers draft and post policies addressing workplace violence and harassment, provide training to employees, conduct risk assessments for workplace violence, and maintain a program to ensure the ongoing implementation and effectiveness of the policies.

"Workplace violence" is defined under the Act as:

a. the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker;
b. an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker; or,
c. a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against

the worker, in a workplace, that could cause physical injury to the worker.

Importantly, the statutory definition under the Act does not require that there be an intent to physically harm a worker. Moreover, a threat can constitute violence in and of itself.

In addition to providing a new statutory framework for workplace violence, Bill 168 imposes ongoing obligations on employers to ensure that preventative measures remain effective. Workplace violence and harassment policies must be reviewed as often as necessary, and at least once every year. Risk assessments regarding workplace violence must be conducted as often as necessary to continue to protect workers from workplace violence. To this end, the Ministry of Labour recommends that employers conduct a risk assessment annually, and to reassess if the workplace is moved or is reconfigured.

MINISTRY OF LABOUR BLITZ ON WORKPLACE VIOLENCE

The Ministry's recent blitz in the healthcare sector revealed that many employers remain deficient with respect to the requirements under Bill 168. Over a two month period, the Ministry conducted 285 visits to 221 workplaces, the majority of which were hospitals, long-term care homes and residential group homes.

During these visits, inspectors focused primarily on compliance in the following four key areas:

1. **Policies**: have employers properly drafted and posted policies in the workplace to address workplace violence and harassment?
2. **Training and Instruction**: have employees received training regarding these policies, and has the employer retained records demonstrating that training has been provided?
3. **Risk Assessments**: has the employer conducted annual reviews of its workplace to assess the various risks related to the work being performed?
4. **Programs to Control the Risks of Violence**: has the employer implemented a program to respond to the risks identified in its annual assessments, and maintained a procedure to investigate and respond to potential incidents in the future?

Out of these 285 visits, the Ministry issued 307 orders under the Act. The fact that inspectors issued, on average, more than one order per visit is a clear indicator that many employers are still not in compliance with the new requirements, even three years after their introduction.

In particular, the blitz revealed deficiencies in three key areas. First, employers are not conducting risk assessments to identify risks that could arise from the nature of the workplace, the type of work, or the conditions of work. Second, many employers still have not created written workplace violence and harassment policies, and ensured that those policies are conspicuously posted in their workplaces. Finally, employers have failed to annually review their policies and re-assess the workplace violence risks.

RECENT DECISIONS ADDRESSING BILL 168

In addition to the recent Ministry blitz, a number of arbitrators have issued decisions regarding the requirements and impact of Bill 168. In particular, many arbitrators have recognized that workplace violence must be considered an even more serious form of misconduct in light of Bill 168.

The most prominent decision on this issue remains a decision reviewed in more detail in our June 28, 2012 edition of Reaching Out, that of Arbitrator Newman in *Kingston (City) v Canadian Union of Public Employees*, Local 109, [2011] OLAA No 393. In that case, Arbitrator Newman was faced with a grievor who uttered a death threat against another employee. In considering whether termination was an appropriate disciplinary response, Arbitrator Newman identified three key considerations that flow from Bill 168:

1. language that references the end of a person's life or that suggests impending danger constitutes workplace violence under the Act;
2. employees must report incidents of workplace violence, including threats, and employers must investigate and respond to such incidents in a timely and effective manner; and,
3. the importance of workplace safety and the prevention of workplace violence articulated under Bill 168 must be considered when assessing the reasonableness and proportionality of discipline.

Put simply, Bill 168 has increased awareness and the importance of an employer's duty to protect employees from workplace violence and harassment. Where such incidents arise, employers must take into account this heightened awareness, and may be entitled to respond to such incidents with more serious disciplinary measures than might have been reasonable prior to Bill 168. This view has also been expressed by Arbitrator Marcotte in *H.J. Heinz Co. of Canada Ltd. and UFCW*, [2011] OLAA No 47, as well as Arbitrator Monteith in *Zochem and CEP, Local 591G*, [2010] OLAA No 466.

However, as Arbitrator Trachuk held more recently in *Hood Packaging Corp. and CEP, Local 1178*, [2013] OLAA No 226, regardless of whether an incident of workplace violence occurred, an arbitrator still needs to consider all of the surrounding circumstances to determine whether discipline is warranted, and whether the discipline issued was proportional and reasonable. In short, while some incidents of workplace violence may warrant termination, not every such incident will attract such a disciplinary response, irrespective of the statutory requirements established by Bill 168. Accordingly, it is still imperative that employers assess incidents on the specific facts at hand.

RECOMMENDATIONS FOR BEST PRACTICES

Given the Ministry's recent blitz and arbitral decisions since the coming into force of Bill 168, the following recommendations will help to ensure that your organization is in the best position to meet its obligations under the Act:

- **Policies**: ensure that you have drafted and posted a workplace violence and harassment policy. The policy should be reviewed annually, and a record should be kept of such a review;
- **Risk Assessment**: conduct an annual assessment of the risks that are specific to your organization in light of the nature of the workplace, the type of work performed, and the conditions of work. Keep records of any steps taken to respond to risks identified in your assessment, as well as records of annual re-assessments;
- **Training**: keep records to document training of your employees on workplace violence and harassment. Ensure that your training program addresses the procedure that is to be followed by employees who witness or are victims of violence or harassment, and by supervisors or human resource professionals tasked with investigating and responding to such incidents; and
- **Discipline**: assess any incidents of workplace violence or harassment on the specific facts of each case. While not every incident of workplace violence or harassment warrants termination of employment, employers appear to have broader discretion to impose serious discipline in light of the increased importance placed on the prevention of workplace violence and harassment under Bill 168.

PLAYING HOOKY: HOW TO IDENTIFY AND ADDRESS AN ABUSE OF SICK LEAVE

By: Amanda E. Lawrence

In past editions of *Reaching Out* we have highlighted for employers in the social services sector issues of employee absenteeism through both the effective management and substantiation of employee absences. But what happens if an employee's absence is for a dishonest or fraudulent reason? Moreover, what if an employee is working for another employer during the absence?

In this article we discuss not just the types of behaviour that constitute an abuse of sick leave, but also what actions an employer can take in the event of actual or suspected abuse.

WHAT IS AN ABUSE OF SICK LEAVE?

Practically speaking, actions that will constitute an abuse of sick leave can be broken down into two distinct categories: 1) those absences that are taken for a false reason, and 2) those absences that are taken for a legitimate reason but where the employee participates in an inappropriate activity while on sick leave or in receipt of disability benefits.

The first category of abuse, which includes calling in sick without a legitimate reason and/or falsifying an illness, otherwise known as “playing hooky”, is not often considered by employees to be misconduct. In fact, the phrase “saving my sick days for when I feel better” is a running joke in many workplaces. But the reality is that this type of abuse is not only difficult for employers to detect, it also has serious ramifications on the productivity and morale of a workplace.

This specific issue was addressed by Arbitrator Sheehan in *Ineos Nova Ltd. and C.E.P. Local 914*, successfully argued by a partner in our Toronto office. The award involved a grievor who was discharged for falsely calling in sick for two days to do some home improvement tasks. [5] Remarkably, the employer only became aware of the falsification when the grievor phoned in to say that he wasn’t feeling well and would be absent, but then failed to hang up on the call before telling his neighbour that he was being “smart” with his absences and that the employer did not often look into one or two day sick leaves.

In recognition of the fortuitous nature of the employer’s discovery, Arbitrator Sheehan commented on the severity of this type of misconduct and the requirement for employees to be honest in reporting absences. In fact, in an often-cited comment made in recognition of the difficulty in detecting this type of misconduct, Arbitrator Sheehan stated:

Offences associated with dishonesty, including sick leave fraud, strike at the heart of the trust necessary in the employment relationship and have traditionally been viewed by arbitrators as constituting very serious misconduct. [6]

As highlighted by the Sheehan decision, it is important for employers to be cognizant of, and track, patterns in what are seemingly “sporadic” short absences which may suggest that those absences in fact are not legitimate absences at all. Where the employer has a reasonable suspicion that the short-term absence is not legitimate, it may be necessary to probe further with the employee for substantiation for the absence.

The second category of abuse includes those leaves of absence that are taken originally for a legitimate reason and approved but during which time the employee is found to be working or participating in a prohibited activity. This type of abuse is often complicated and difficult to discipline because the employee may be suffering from a legitimate illness or disability and it may not be evident that the offending activity is impermissible during the leave.

For example, in *OPSEU Local 529 and Toronto Community Housing Corporation*, successfully argued by William Lemay, a partner in our Toronto office, the grievor had been discharged after expressing what was potentially a legitimate opposition to modified duties, but was then observed playing in a golf tournament in Myrtle Beach. [7] In upholding the discharge, Arbitrator Cummings accepted that while golf itself was not inconsistent with the grievor’s condition, “the grievor’s willingness and ability to participate in a golf tournament a 1,500 kilometre car ride from home at the same time that he was trying to avoid a return to modified duties presents a striking contrast.” [8]

In a more complex example of this type of abuse, Arbitrator Cummings recently had cause to revisit the issue of abuse of sick leave in *OPSEU* and *VHA Home Healthcare*, successfully argued by Lauri Reesor, a partner in our Toronto office. In *VHA*, the grievor was discharged after the employer discovered that she had performed some work for another employer while in recovery from cancer and in receipt of long-term disability benefits. [9] As such, while it was readily accepted by both the employer and the arbitrator that the grievor had a legitimate and very serious illness, that was not enough to outweigh the grievor’s deliberate attempt to mislead her employer and the insurance company with respect to her alternate employment. Further, the arbitrator placed significant weight on the grievor’s refusal to admit any wrongdoing and her continued dishonesty throughout the hearing.

HOW EMPLOYERS SHOULD ADDRESS THIS TYPE OF ABUSE

In light of the foregoing, it is evident that the type of conduct that will constitute an abuse of sick leave can vary greatly in nature, duration, and apparent severity. That being said, there are nonetheless a few principles that employers should remember when addressing an employee who is, or may be, abusing a leave of absence.

First, even where an employer is aware that an abuse is occurring, the employer has a duty to conduct a full investigation in respect of the conduct. This includes speaking with all possible witnesses, such as alternate employers, interested parties, co-workers, and of course the employee herself. Further, as in any investigation, detailed notes of all conversations and the steps taken in arriving at a final conclusion must be made contemporaneously and retained.

Second, the employer has a duty to give the employee an opportunity to explain her conduct, and, likewise, the employee has a corollary duty to provide an honest explanation. Accordingly, where an employee provides a meaningful explanation or apology, the employer is obliged to consider this in determining the appropriate level of discipline.

Conversely, in the absence of full cooperation from the employee and where no information is provided to contradict what the employer has learned, the employer does not have an obligation to warn the employee not to be dishonest in making a claim for sick leave prior to disciplining the employee.

As noted above, a common problem for many employers is the sporadic short absences. Where there is no apparent pattern to those absences, detecting sick leave abuse may be difficult. However, employers should be monitoring employees who appear to incur a regular pattern of sporadic absences, such as falling ill every Friday or Monday. In those cases, it may be necessary (and prudent) for the employer to seek further and better medical or other information to substantiate the absences.

Finally, employers should remember that where an employee has engaged in an activity that has irreparably damaged the employment relationship as the result of intentional deceit, and there is a failure to admit any wrongdoing or failure to apologize for the misconduct, the employer may impose a severe form of discipline for even a single occasion of dishonesty in an effort to deter the same type of behavior from other employees.

THE LEGAL IMPLICATIONS OF “VOLUNTEERS” IN THE WORKPLACE

By: Kathryn L. Meehan

The benefits of using volunteers in organizations are obvious. Less obvious, however, are the potential risks and liabilities associated with utilizing volunteers in the workplace. Organizations in the social services sector wishing to use volunteers should ensure that they have considered all of the potential legal implications carefully.

WHO IS A VOLUNTEER?

Unlike some other Canadian jurisdictions, Ontario does not have specific legislation addressing the use of volunteers in the workplace. As a result, Ontario organizations need to be alive to potential liability issues arising from a wide range of sources. For example, individuals who are classified as volunteers by the organization or company may actually be considered employees for the purposes of the *Employment Standards Act, 2000* (“ESA”) or the *Labour Relations Act, 1995* (“LRA”).

The improper use of volunteers and unpaid “interns” to perform work for the benefit of the employer has recently received a great deal of media attention and it is therefore prudent for organizations to review whether or not their volunteers (or “interns”) are properly characterized as non-employees.

IS THE VOLUNTEER ACTUALLY AN UNDERPAID EMPLOYEE?

The ESA does not provide a definition for volunteer. Rather, the ESA speaks to who is an employee and includes, among other things, a person, including an officer of a corporation, who performs work for or supplies services to an employer for wages. The definition of wages in the ESA is quite broad:

“wages” means,

(a) monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied,

(b) any payment required to be made by an employer to an employee under this Act, and

(c) any allowances for room or board under an employment contract or prescribed allowances, but does not include,

(d) tips and other gratuities,

(e) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and that are not related to hours, production or efficiency,

(f) expenses and travelling allowances, or

(g) subject to subsections 60 (3) or 62 (2), employer contributions to a benefit plan and payments to which an employee is entitled from a benefit plan[.].

The definition of “wages” also tends to be interpreted broadly by adjudicators. There is the possibility that individuals performing volunteer duties and who receive an honorarium of some sort, may, in certain circumstances, be deemed to be employees under the ESA. If so, this would trigger a duty on the part of the organization to treat these individuals as a employees with respect to various ESA entitlements, for example, by paying wages, overtime pay, vacation pay and public holiday pay.

WITHHOLDINGS AND REMITTANCES

There is also the risk that should an individual be improperly classified as a volunteer, and instead be found to be employee, any honorarium or benefit received by the volunteer will be considered to be income for income tax purposes, triggering the organization’s obligation to withhold and remit. Where an individual is improperly classified, there may be a responsibility on the part of the organization to deduct and remit EI and CPP premiums and other employment-related deductions.

RISK OF UNIONIZATION

Employers, including those in the social services sector, should also be cognizant that volunteers may consider themselves employees and seek to unionize under the LRA. There are cases where the right to certify under the LRA has been granted to groups of individuals, despite the fact that the organization considered them to be volunteers.

UNIONIZED WORKFORCE

Employers with unionized workforces, even where there is no express restriction on the use of volunteers in the collective agreement, should be aware that the union may argue that tasks performed by volunteers are actually work of the bargaining unit and a violation of the collective agreement.

PRIVACY CONSIDERATIONS

As described in our May 2013 edition of Reaching Out, there have been several well publicized data breaches which have resulted in class actions for breach of privacy, negligence and other causes of action. Social services organizations encounter a wide variety of sensitive personal information and therefore need to give careful consideration as to whether volunteers will have access to private or confidential information, and if so, ensure that the organization has taken steps to address any privacy concerns and put in place mechanisms to avoid potential data breaches.

SAFETY IN THE WORKPLACE

Under the *Occupational Health and Safety Act*, a worker is defined in part as being a person who performs work or supplies services for monetary compensation. If an individual is truly a “volunteer”, organizations will still have responsibility for the health and safety of those individuals visiting or attending the workplace. Under the *Workplace Safety and Insurance Act*, some volunteers are included (such as volunteer firefighters), but most are not. There are also minimum age requirements for volunteers in different industries and roles.

Volunteers themselves may become liable for damages where an individual under their care or someone impacted by their actions becomes injured or their property is damaged. Special duties will arise in circumstances where volunteers are involved with caring for children or individuals with disabilities, seniors etc.

Organizations have a duty to the volunteers to take reasonable care and to provide safe premises. Risk assessments conducted in the workplace should include possible risks and threats to any volunteers in the workplace, and volunteers should receive appropriate safety training.

HUMAN RIGHTS

Organizations will also have a duty to abide by their obligations under the *Human Rights Code* when dealing with volunteers, although some non-profit organizations may be exempt from certain human rights provisions.

CONCLUSION

Given the various avenues from which liability related to volunteers can arise, social service organizations would be prudent to seek legal advice on their particular circumstances prior to commencing a volunteer program.

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

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[1] 2013 FC 113 (CanLII).

[2] 2013 FC 117 (CanLII).

[3] 2012 HRTO 1590 (CanLII).

[4] *Ibid*. at para. 172.

[5] 193 L.A.C. (4th) 241 (Sheehan).

[6] *Ibid*. at 38.

[7] 2012 CanLII 51331 (ON LA) (Cummings).

[8] *Ibid*. at 53.

[9] *Ontario Public Service Employees Union and VHA Home Health Care*, (13 September 2013, Cummings).

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