Reaching Out

Reaching Out – Fifth Edition

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Dear Friends,

Well, the verdict is in. Six more weeks of winter according to our furry rodent weather prognosticators! And what better way to fill those cold blustery evenings than something interesting and topical to read? Welcome to the Winter 2014 Edition of *Reaching Out*, our newsletter specifically focussed on issues relevant, and of particular interest, to human resource professionals and other members of management working in the Social Service Sector. In this edition of *Reaching Out*, we look at a number of key issues that our clients in the Sector often tell us are issues that they have to grapple with on a daily basis.

First, Andrew Zabrovsky takes you through a practical refresher on the negotiation of settlements, dispelling some of the mystery around terms such as “with” or “without” prejudice and providing you with other helpful tips on what to do (and not to do) when entering into Minutes of Settlement.

An issue that clients constantly identify as particularly challenging and with which employers struggle is the intersection of performance management and employees who present with disabilities that may require accommodation. Employees who identify with disabilities in the workplace are not immune from performance management and discipline, though there may be special considerations that the employer must first consider. In her article, Carolyn McKenna takes an in-depth look into this multi-faceted issue and the state of the law, with a focus on providing useful principles to guide employers through the performance management process in these circumstances.

Next, Colin Youngman, of our Kingston office, provides an update on Bill 168 and the *Occupational Health and Safety Act*. Did you know that on November 13, 2013 the Ontario government filed a new regulation requiring employers to ensure workers and supervisors receive mandatory safety awareness training? Colin provides a summary of the requirement that comes into force on July 1, 2014. Also of significance with respect to the enforcement of Bill 168 obligations are two recent decisions of the Ontario Labour Relations Board which mark a significant change in its approach to the handling of workplace harassment reprisal complaints. Colin takes you through a summary of the jurisdictional issue and highlights the key implications for employers.

Finally, it is helpful to have a refresher on the substantive and procedural aspects of the duty to accommodate. Laila Karimi Hendry reviews the recent decision in *Smith v. Network Technical*

Services Inc., a religious accommodation case, and highlights the importance of employers bearing in mind various procedural considerations when an employee brings forth any type of accommodation request.

As always, it is our hope that you enjoy reading this edition of *Reaching Out*. I encourage you to contact me at lauri-reesor@hicksmorley.com if you have requests for future article topics or of course, please feel free to contact your regular Hicks Morley lawyer. Stay warm and happy reading! (and may the snow be melted before the Spring Edition is published…)

Lauri A. Reesor
Editor

IN THIS ISSUE

MINUTES OF SETTLEMENT – HELPFUL TIPS FOR EMPLOYERS

By: Andrew N. Zabrovsky

Normally when parties are in the process of settling a matter – be it a civil claim or a labour grievance – their focus is on getting "the deal". In negotiations, both parties want to get a "win" for the organization, or at least come to a resolution on terms they can live with. Successfully reaching a deal is often the most *exciting* part of negotiations – but it is hardly the most *important* part. When all is said and done, the parties must reduce their agreement to writing, and this is where they can get themselves in trouble. The written product that emerges from settlement discussions must be a document that is clear, comprehensive, and enforceable. Below are some key issues to consider when preparing and signing Minutes of Settlement.

PREJUDICE – WITH OR WITHOUT?

There seems to be a lot of confusion when it comes to the word "prejudice" and how it is used in legal communications and agreements. While being "prejudiced" in non-legal circles cannot be condoned, the legal meaning of "prejudice" must be properly understood before it can be used correctly.

When an agreement is entered into on a "without prejudice" basis, it is an agreement that cannot be used between the parties to bind their future interactions. Such a settlement permits the parties

to focus on the matter before them without worrying about how a settlement may affect their relationship going forward. When parties enter into a “without prejudice” settlement, they are leaving open the possibility of disagreeing over the same issue at a future date.

On the other hand, a settlement that is entered into on a “with prejudice” basis is intended to bind the parties going forward. A “with prejudice” settlement can be held up by either party to resolve any future grievances which arise on the same subject matter.

Before entering into any settlement, it is important to address how the parties intend the settlement to be used. Parties are often drawn to the idea of a “without prejudice” settlement as the lack of future restriction makes a settlement more palatable. However, if a matter is of vital importance to one or both parties, it may make sense to see whether a final resolution of the issue can be reached on a “with prejudice” basis.

CONFIDENTIALITY CLAUSES ARE NOT AN EMPTY THREAT

When parties enter into settlements, they generally do so with two goals – finality and confidentiality. These two goals go hand in hand, as a central aspect of putting matters in the past is ensuring that they will not be spoken of again in the future. Thus, most settlements include some form of confidentiality clause which requires one or all parties to keep the terms of the settlement confidential.

While confidentiality clauses are commonplace, their enforceability has been questioned. In a recent arbitration decision, Arbitrator William Marcotte affirmed that confidentiality clauses can be relied on and that relief may be available to a party that enforces such a clause.

In *Barrie Police Services Board v. Barrie Police Association*[1] the employer and association entered into a settlement concerning premium pay for the grievor, only to have the grievor disclose the particulars of that settlement while running to become association president. In that case, the grievor argued that he could not be required to abide by the confidentiality clause because he was not a party to the agreement and did not sign the minutes of settlement. The association also argued that because the settlement document was silent as to the appropriate remedy for a breach, it was open to the arbitrator to determine whether any of the funds paid out under the settlement ought to be repaid by the grievor.

The arbitrator found that, regardless of whether the grievor signed the settlement document or agreed with its terms, he was bound by the association’s agreement to keep the settlement confidential. However, in the absence of a clause specifying the relief owed upon a breach of the agreement, this issue was left to his discretion. Ultimately, given the serious and deliberate nature of the grievor’s actions, the arbitrator found that it was appropriate to require the grievor to refund all of the money paid to him under the settlement.

This decision reveals an important choice that parties must make when drafting a confidentiality agreement – should the parties agree beforehand on the relief owed in the event of a future breach? While a clause setting out specific relief for a breach of contract may be enforceable, such a clause may also be struck down if the relief specified is unfair or unconscionable. These clauses provide certainty, but they also carry some risk. However, where large sums of money are being exchanged, certainty is valuable.

On the other hand, the *Barrie Police* decision teaches us that the failure to have a strict remedy clause does not leave the parties without recourse in the case of a confidentiality breach. If the parties are comfortable leaving the issue of remedy to an arbitrator, this eliminates the risk of the clause being found to be unenforceable, and may make it easier to reach an agreement. For lower value settlements, this approach may be one to consider.

GENERAL DAMAGES ARE NOT A SOLUTION TO EVERY PROBLEM

It is rare to engage in settlement discussions without hearing the words “let’s just make it general damages.” General damages are “non-pecuniary” damages which are often awarded to an individual for pain and suffering. In settlement discussions, these are often suggested as a means of resolving a matter because of a misperception that these damages are not subject to income tax.

While it is true that general damages are not taxable in some circumstances, they are not a cure-all for every dispute. Where money is being paid to an individual as a result of the loss of his or her employment, that money is taxable, regardless of whether it is paid as wages or as general damages. Thus, when settling a termination case, the notice and severance payments being made to an employee cannot be converted to general damages to change their tax treatment. Failure to remit taxes on such payments can create liability on the part of the person leaving employment and the employer.

General damages can be paid to an individual as part of a settlement in circumstances where there has been an alleged injury to an employee’s feelings, dignity or self respect – such as in cases where there has been an alleged violation of the *Human Rights Code*. However, where human rights allegations arise in the context of a dismissal, it is important to remember that general damages can only be used to resolve the human rights issue, and not the entirety of the dismissal claim.

Before incorporating general damages into a settlement, it is best to consider what loss or harm they are being used to compensate. If they are used to resolve a termination, then they likely will be taxable. If they are being used in the human rights context solely to remedy injury to feelings or self respect, then they will not be subject to taxation.

CONCLUSION

Beyond the issues addressed above, it is important for parties entering into any agreement to consider the purpose of every paragraph being drafted and each word being used. Extraneous or unclear words and provisions that are added out of habit can get the parties into trouble when it comes to enforcing their agreement. A good settlement document should be clear and concise, and should include only the words and provisions necessary to encapsulate the agreement that is being reached.

THE INTERSECTION OF PERFORMANCE AND DISABILITY

By: Carolyn L. McKenna

The intersection of performance issues and claims of disability can make performance management quite a complex process for employers. The employer must consider whether the employee's poor performance is culpable or whether it is the result of a disability requiring accommodation. The focus of this article is psychological disability, where this issue most frequently arises. However, employers should be aware that it can also arise in cases of physical disability.

When an employer begins to manage an employee's performance and the employee subsequently claims to suffer from a psychological disability, a number of issues arise. Is the employee's alleged condition a "disability" for the purposes of the Ontario *Human Rights Code* ("Code")? Has the employee provided adequate medical evidence? Does medical documentation reveal a nexus between a disability and the employee's poor performance? If so, should the disability be considered a mitigating factor with respect to any applicable discipline? Is the employer able to accommodate the employee (which may assist in improving performance)? This article will focus on the employer's management of performance issues in the face of psychological disability claims.

HAS THE EMPLOYEE IDENTIFIED A DISABILITY PROTECTED BY THE CODE?

When an employee claims to suffer from a psychological disability in the face of an investigation into the employee's performance, one must consider whether the condition identified is a "disability" for the purposes of the Code. Having one's performance scrutinized naturally generates a level of stress and anxiety. Therefore, it is common for employees to claim they are suffering from stress once a performance issue has been identified. In such a situation, employees may even cease reporting to work as a result of the alleged stress they are experiencing.

Leaving aside, for the moment, the issue of whether the alleged mental stress is causally related to the employee's performance issues, the employer must consider whether the employee is suffering from a "disability" requiring accommodation. According to the Human Rights Tribunal of Ontario, stress is not necessarily a disability within the meaning of the Code.[2] In this regard, the British Columbia Human Rights Tribunal has stated: "Stress, in itself, is not a disability for the

purposes of the *Code*. In particular, workplace stress resulting from an employer investigating alleged performance problems, or from a problematic relationship with a supervisor, is not alone sufficient to constitute a disability for *Code* purposes."[3]

Thus, an employee must suffer from more than the normal stress and anxiety associated with the workplace and performance management to attract the protection of human rights legislation. However, an employer may have an obligation to inquire further when an employee self-identifies as stressed or anxious.

IS THE MEDICAL DOCUMENTATION SUFFICIENT?

A bare assertion that the employee is a person with a disability, such as depression, is not sufficient to establish a psychological disability. However, such an assertion does create an onus on an employer to make further inquiries to obtain information as to whether an employee has a disability requiring accommodation. [4]

Sufficient medical documentation is particularly important when claims of psychological disability arise. As one arbitrator ha's put it:

It is in cases of invisible disability, particularly mental illness, that questions most often arise about an individual's request for a particular accommodation and the adequacy of supporting information. … Saying that a person has a mental illness … tells the employer nothing about the nature of the illness, which the employer is entitled to know, or how it affects the employee's ability to continue or return to work, or the necessary accommodation in that respect.[5]

In order to meet the definition of disability under the Code with respect to claims of psychological disability, a one-sentence medical note typically will not suffice. The Human Rights Tribunal of Ontario has stated that "… there needs to be a diagnosis of some recognized mental disability, or at least a working diagnosis or articulation of clinically significant symptoms, from a health professional in a report or other source of evidence that has specificity or substance." [6]

Once the employer knows that the employee may have a psychological disability requiring accommodation, the employer is entitled to medical information regarding:

(a) The nature of the illness;

(b) Whether the disability is permanent or temporary, and the employee's prognosis;

(c) The restrictions or limitations flowing from the disability;

(d) The basis for the medical conclusions;

(e) The treatment of the disability, including medication (and possible side effects) which may impact on the employee's ability to perform his or her job duties and interact with others. [7]

This type of information is necessary to both provide evidence of the employee's disability and to assist the employer in meeting its duty to accommodate, if a disability is substantiated.

Furthermore, such information is particularly important with respect to employees who deal with vulnerable persons in the course of their employment, including children, the elderly and disabled persons. Depending on the nature of the performance issues and the employee's job duties, the employer may require medical documentation to verify that the employee is able to work safely.

Both the employee, and the employee's union, have an obligation to cooperate in the accommodation process. Therefore, they have an obligation to provide the type of information outlined above in order to facilitate this process.

If an employee provides the employer with medical information that is not sufficient to facilitate the accommodation process, the employer ought to request further and better medical information. The employer may do so by requesting that the employee's doctor complete a functional abilities form. In this regard, the employer should also request the employee's consent to correspond directly with the employee's health care professionals in order to obtain relevant medical information.

While employees may be resistant to such broad disclosure of confidential medical information, especially as it relates to their mental health, they must disclose what is reasonably required to facilitate accommodation. For example, in *Complex Services Inc. v. Ontario Public Service Employees Union, Local 278*,[8] while the medical information provided suggested that the grievor had a mental illness, it was inadequate for accommodation purposes. In this case, the grievor refused to allow the employer to engage the assistance of an appropriate medical expert for the purpose of reviewing the grievor's medical documentation.

Arbitrator Surdykowski found that the grievor took a "rigid and unrealistic view" regarding medical disclosure. He noted that while the grievor was protective over her medical information, "no right to privacy, including the right to privacy with respect confidential medical information, is absolute … [an employee] is not the sole or final arbiter of what is reasonably required and must be produced in that respect."[9] Accordingly, Arbitrator Surdykowski ordered that the employer be permitted to conduct a review of the relevant medical documentation with an appropriate medical specialist or expert.

IS AN INDEPENDENT MEDICAL EXAMINATION REQUIRED?

If the medical information provided is inadequate, the employer may request an Independent Medical Examination ("IME"). The medical information provided may be inadequate in a number of ways. It may be unclear in terms of substantiating the existence of a disability. Additionally, the

information may not reveal how the disability impacts on the employee's performance or how the employee can be accommodated to improve performance. In these circumstances, an employer may request an IME in order gain clarity on such issues.

The employee may, nevertheless, object to attending an IME. However, where an employer's attempts to obtain adequate medical information have been futile and lack of such information is preventing the employer from meeting its duty to accommodate, an arbitrator will be inclined to order an employee to undergo an IME at the employer's request. [10]

As Arbitrator Surdykowski noted in *Complex Services*, the Human Rights Commission's policy that states that no one can be forced to undergo an IME, while technically correct, is "clearly wrong as a practical matter. Although an IME is a resource of last resort, there are cases in which one is necessary and appropriate." [11]

IS THERE A NEXUS? IS THE DISABILITY A MITIGATING FACTOR?

The fact that an employee has a disability does not eliminate the employer's right to discipline that employee in appropriate circumstances. Once the employer has obtained sufficient medical documentation substantiating a psychological disability, it must consider whether the employee's medical condition is the cause of the employee's poor performance. If there is no causal link, the employer may discipline the employee for poor performance. However, there may be circumstances in which the employee's misconduct is considered culpable, but the employee's psychological disability is viewed by an arbitrator as a factor which mitigates the disciplinary penalty.

Consider the following case in which the employee's disability was viewed as a mitigating factor, rather than a full defence of the employee's misconduct. In *Re Canada Post Corp. and C.U.P.W. (Crawford)*[12], a letter carrier was discharged for placing mis-sorted mail into a street letter box, instead of delivering the mail. In the course of the investigation into his conduct, the grievor alleged that he was affected by a learning disability. After he was discharged, he obtained an assessment from a psychologist who suggested that his disability frustrated his ability to sort mail and deliver it sequentially. However, the psychologist also concluded that his disability would not play a role in forming his intention to place the mis-sorted mail into a street letter box.

Arbitrator Hornung found an indirect connection between the grievor's disability and his misconduct. Essentially, he found that the grievor's inability to sort the mail was linked to his disability and that part of the grievor's motivation for placing the mail in the street letter box was to cover up the fact that he had mis-sorted the mail. In this regard, Arbitrator Hornung stated: "At the end of the day, I am not able to entirely separate his unintentional mis-sorts of the mail – based on his disability – from his intentionally red boxing the mis-sorts. However, the connection between the two is not seamless."[13] As a result, he held that the grievor's disability was sufficient to modify the penalty of discharge to a lengthy suspension.

Conversely, where there is no connection whatsoever between the employee's psychological condition and the conduct in question, an arbitrator will not be inclined to mitigate the penalty on the basis of disability. In *Re Sifto Canada Corp. and C.E.P., Local 16-0 (Glousher)*,[14] the grievor deliberately engaged in a number of serious safety infractions. He was discharged as a result. During the course of the investigation, the grievor stated that he was seeing a doctor and would be seeking a psychiatric consultation. In the course of the grievance procedure, the union submitted that a learning disability and attention deficit disorder affected the grievor's ability to function.

While Arbitrator Luborsky acknowledged that a disability could operate as a mitigating factor, he did not find it a mitigating factor in this case. In this regard, he stated:

… I accept that an employee's disability is a proper consideration in the exercise of arbitral discretion as part of the essential character and circumstances of the employee that an arbitrator should take into account in determining what is "just and reasonable" punishment in each case. However, it would in my opinion take clear evidence showing that the disability diminishes the employee's appreciation of the nature and effect of the misconduct for which the employee has or is undertaking a reasonable course of treatment to have a material impact on the exercise of arbitral discretion to reduce an otherwise appropriate penalty.[15]

In this case, the grievor's disability did not affect his ability to distinguish right from wrong nor to appreciate the importance of the company's safety rules and the fundamental obligation to be honest with his employer. Therefore, the disability was not sufficient to mitigate the penalty of discharge.

Similarly, an arbitrator is unlikely to modify the penalty of discharge where the non-culpable aspects of the employee's misconduct have irreparably damaged the trust between employer and employee. For example, in *Re Richmond Hill (Town) and C.U.P.E., Local 905*,[16] aspects of the employee's misconduct were associated with his alcoholism. However, Arbitrator Brent did not view his condition as a sufficient reason to reinstate the employee. The damage to the employment relationship was too severe. Arbitrator Brent noted:

He is an alcoholic and is taking steps to deal with his problem, and that is to his credit. Be that as it may, it is clear to me that the grievor has not completely acknowledged his misconduct, and has not been completely forthright in his evidence given at the hearing. He occupied a position of trust, he behaved in a manner which was far below the standard of conduct which any reasonable employer could expect of him. In view of his lack of candor I do not believe that it is reasonable to conclude that the employment relationship can be rehabilitated. [17]

Thus, the mere existence of a psychological disability absent any connection to the performance issues whatsoever, will not necessarily operate to mitigate the disciplinary penalty. Nor will such a disability be sufficient to modify a discharge where the employee's misconduct has irreparably damaged the employment relationship. However, in certain circumstances, an indirect link between

the employee's disability and the employee's performance issues may be sufficient to modify the degree of discipline imposed. Additionally, if the disability diminishes the employee's appreciation of the nature and effect of the misconduct, the disability may be viewed as a mitigating factor.

CAN THE EMPLOYER ACCOMMODATE THE EMPLOYEE?

In the event the medical evidence substantiates a causal link between the disability and the employee's performance issues, the employer must consider whether it can accommodate the employee (which may assist in improving performance).

The employer's obligation is to accommodate the employee up to the point of undue hardship. In considering whether accommodating the employee would cause undue hardship, the following factors ought to be considered: cost, outside sources of funding, safety, size of organization, interference with rights of other employees and employee morale.

Common examples of accommodations for psychological disabilities include: job restructuring and altering methods by which tasks are accomplished; modified work schedules; flexibility in work hours; alteration to shift schedules; adaptive technology; providing information about community resources and supports; and, time off for treatment/rehabilitation.

Employers must keep in mind that undue hardship is a difficult standard to meet. The employer must be able to show that it considered whether modifications could be made to the employee's position, and if not, whether there is other work the employee can perform, either with or without modifications. The employer must be able to establish that it canvassed all work available in the workplace. In this regard, the employer must consider bundling duties or placing the employee in another position permanently.

CONCLUSION

Once performance issues are raised and the employee claims to suffer from a psychological disability, the employer must consider whether the employee has provided sufficient evidence of a disability requiring accommodation. If not, the employer must take steps to inquire further into the nature of the employee's condition and the potential accommodations required. Where an employee fails to provide adequate information, the employer ought to consider requesting an IME.

Only through such inquiry will the employer be able to determine whether the employee's performance issues are causally related to a psychological disability and, thus, whether the employee's poor performance is culpable or not. In any event, the employer must consider whether the disability will be viewed as a mitigating factor. This process is also necessary to determine what, if any, accommodations may be required to assist the employee in improving his or her performance.

OCCUPATIONAL HEALTH AND SAFETY UPDATE

By: Colin J. Youngman

NEW MANDATORY HEALTH AND SAFETY TRAINING

On November 13, 2013 the Ontario government filed a new regulation under the *Occupational Health and Safety Act* ("OHSA") requiring employers to ensure workers and supervisors receive mandatory safety awareness training. The regulation comes into force on July 1, 2014.

The training requirements are new requirements under the OHSA and apply to all Ontario employers. They may impose significant obligations on your organization and we encourage you to review our FTR Now of November 25, 2013 which describes the requirements, in detail. The Ministry of Labour has basic training materials on its website for use by employers. However, in an effort to enhance worker and supervisor safety, employers may wish to provide more fulsome health and safety training to workers and supervisors based on the specific hazards those workers will encounter in the workplace.

ONTARIO LABOUR RELATIONS BOARD ASSUMES JURISDICTION OVER WORKPLACE HARASSMENT REPRISAL COMPLAINTS

Following the implementation of Bill 168, a concern of employers was that the Ontario Labour Relations Board ("Board") would hear and decide complaints under the OHSA alleging workplace harassment. However, in a 2011 decision (*Investia* [18]), in which an employee asserted reprisal when he was allegedly terminated after filing a harassment complaint, the Board commented that its statutory authority was very limited with respect to the new workplace harassment additions to the OHSA. The Board reasoned that because an employer's obligations under Bill 168 were limited to creating a workplace harassment policy and program and providing certain training to workers, but did not extend to an obligation to ensure a harassment-free workplace, the reprisal provision had no application. Essentially, a reprisal complaint needed to relate to negative consequences for a worker acting in accordance with the OHSA or seeking enforcement of the OHSA. Being fired for making a harassment complaint did not fit within those categories. A number of Board decisions applied the reasoning from *Investia* and the common wisdom had become that harassment-related reprisal applications could be disposed of on a preliminary basis.

In two decisions rendered late last year[19], the Board expanded the scope of its authority to consider complaints arising from the Bill 168 workplace harassment amendments to the OHSA, thus moving away from its decision in *Investia*.

In *Ljuboja v Aim Group Inc.*, the Board again considered a reprisal complaint brought under section 50 of the OHSA by an applicant when his employment was terminated shortly after he complained of workplace harassment. The responding parties strenuously argued, on the basis of prior

jurisprudence including *Investia*, that the Board had no jurisdiction to hear a complaint that a worker was terminated for filing a harassment complaint with the employer.

Vice-Chair Nyman found that *Investia* did not conclusively determine the scope of the Board's authority to deal with workplace harassment complaints and disagreed with the reasoning in that decision that the absence of a general statutory obligation to prevent workplace harassment deprives the Board of jurisdiction over reprisal complaints related to filing workplace harassment complaints.

While the obligations on employers with respect to workplace harassment are entirely procedural, Vice-Chair Nyman reasoned that it would undermine the obligations to have an internal process for addressing complaints of workplace harassment if an employer is free to terminate a worker because he or she brought forward a complaint in accordance with that process. Such an interpretation of the OHSA would be "untenable", would strip the employer's obligations of any meaning, and the health and safety purpose intended by the Legislature would be "eviscerated". Instead, the obligations to develop and maintain a program to implement a workplace harassment policy must mean that there is an active obligation on an employer to enable workers to make complaints about incidents of workplace harassment and that terminating an employee for doing so could qualify as an unlawful reprisal.

If this interpretation of the OHSA is upheld and adopted moving forward, the Board's jurisdiction (and by extension the Ministry of Labour's enforcement powers) relating to workplace harassment policies and programs are actually broader than initially believed. Employers will need to be cognizant of these increased powers when addressing employee complaints of workplace harassment.

MERE COMPLIANCE WITH OHSA ORDER NOT A MITIGATION SENTENCING FACTOR

Following a workplace accident at Flex-n-Gate, a Ministry of Labour ("MOL") inspector investigated the accident and issued two orders – the first order requiring compliance with applicable regulatory provisions for the safe movement of material, and the second, a stop work order prohibiting the employer from using the equipment until such compliance. In addition, the employer was charged with multiple offences under the OHSA.

The employer took immediate corrective action and implemented a new procedure, as required by the compliance orders. However, there was no evidence that this new procedure, implemented after the accident, went beyond the requirements of the compliance orders. A Justice of the Peace convicted the employer of two offences under the OHSA and imposed a fine of $25,000 for each offence, plus a mandatory victim fine surcharge of 25%.

The employer appealed and the Ontario Court of Justice allowed an appeal of the sentence, finding

that the actions taken by the employer after the accident were a mitigating factor. Accordingly, it ruled that the two $25,000 fines could be paid “concurrently”, which resulted in a total fine of $25,000, plus the victim fine surcharge.

The MOL appealed, and the Court of Appeal for Ontario[20] found that the lower court judge erred in treating post-offence corrective action required to achieve compliance with a MOL order as a mitigating factor for sentencing purposes. It ruled that doing so would both undermine the OHSA goal of accident prevention, and the statute’s most important sentencing principle – deterrence. Here, the lower court judge sought to reward the employer for “doing the right thing”. The Court stated:

If, after having contravened a safety standard, an employer then acts to correct the problem, it is not “doing the right thing”; it is doing what the statute requires it to do. It ought not to be “rewarded” for its compliance.

However, the Court also noted that action taken after an accident, which goes beyond the requirements of an inspector’s order, is a relevant mitigating factor which a court is entitled to take into account on sentencing.

The Court also stated that action taken to promote health and safety before an accident occurs is treated differently from corrective action taken only in response to an inspector’s order. In this case, the employer had retained a health and safety consultant, prior to the accident, to do an independent compliance audit of its health and safety program. The employer implemented a number of changes recommended by the consultant, and the Justice of the Peace correctly acknowledged the steps taken by the employer “to establish a safe working environment”.

The Court allowed the appeal and reinstated the total fine of $50,000, plus the victim fine surcharge, ordered by the Justice of the Peace.

While a social service agency is not a manufacturing plant, your organization has unique health and safety related risks, such as employees visiting clients in the community. This decision underscores the importance of employers taking proactive steps to promote health and safety in the workplace, no matter what hazards your employees face. Proactive steps can form part of a “due diligence” defence to any charges and, in the event of conviction, can be used to advocate for a lighter sentence. On the other hand, post-incident actions of an employer are not, in any way, a defence to charges under the OHSA and mere compliance with an inspector’s order will not be a mitigating factor on sentence. Importantly though, post-incident remedial actions of an employer which go above and beyond any inspector’s orders, can be used by the employer to advocate for a lighter sentence.

HUMAN RIGHTS 101 – A CASE STUDY REFRESHER

By: Laila Karimi Hendry

The recent case of *Smith v. Network Technical Services Inc.*[21] reminds us of employers' substantive and procedural obligations in complying with the Ontario *Human Rights Code* ("Code").

In *Smith*, the Human Rights Tribunal of Ontario found that the employer discriminated against an employee on the basis of creed when it terminated his employment because the employee would not work on Sundays. Before the employee was hired, he advised the employer that he could only work one or two Sundays in a month due to his religious beliefs as an evangelical Christian. Shortly after he was hired, there were staffing shortages and so the employer required him to work an increasing number of Sundays.

Eventually, the employee provided a letter to the employer refusing to work on Sundays. He referenced the Retail Workers Guide to the *Employment Standards Act, 2000* ("ESA"), which provides that employees in retail have the right to refuse work on Sundays on the basis of religion. The employer believed that this provision in the ESA did not apply to the employee because it was not a retail business establishment. The employer did not consider whether the Code applied to the situation. Additionally, the employer refused to consider any compromise to accommodate the employee's request.

Instead, the employer told him that "if he did not work Sundays, he would not be working there." The employer then terminated the employee's employment, purportedly for being confrontational at the meeting and for having been previously "written up". The employer testified that he would have accommodated the employee if the employee was not "confrontational and disrespectful", and that he had no intention of discriminating against the employee. The employer was also Christian and attended church regularly. However, the employer admitted that the employee's refusal to work on Sundays was one of the reasons for the termination.

The Tribunal held that even if there were other reasons for termination, the fact that even one of them was discriminatory is enough to engage the Code. Discrimination does not need to be the only reason or even the main reason for the termination; it just has to be one of the reasons for the termination. Whether or not the discrimination was intentional is irrelevant.

It is important to note that the employer not only failed to fulfill his substantive obligation to reasonably accommodate the employee's request to not work Sundays, the employer did not even consider an accommodation. At no time did the employer engage in his procedural obligation to consider ways in which the employee's request to not work Sundays could have been reasonably accommodated short of undue hardship.

The employee also sought lost wages, but did not provide any documents to prove such wage loss.

In the end, the Tribunal ordered the employer to pay $5,000 to the employee as monetary compensation for injury to dignity, feelings and self-respect, to take an on-line human rights training course, and to post human rights cards in the workplace to promote compliance with the Code.

PRACTICAL TIPS

Smith reminds us of the following general practical tips to keep in mind when an employee brings forth any type of accommodation request:

- Discuss the request with the employee (and union representative, if applicable) in order to understand the employee's needs and whether the needs are based on a Code-protected ground
- Determine whether the accommodation request is permanent or temporary
- Consider whether the accommodation request can be granted short of undue hardship and if not, what other reasonable accommodations can be put into place
- Discuss the alternative accommodations with the employee (and union representative, if applicable) to determine their viability
- Obtain any applicable third party documents to verify the need for the request, if necessary (e.g. functional abilities form)
- Once the accommodations are in place, engage with the employee (and/or union representative) periodically to determine whether the accommodation is working, needs to be revisited or is no longer necessary

EMPLOYMENT LAW CONSIDERATIONS

It is very important to ensure that accommodation requests are handled properly with a view to treating the employee fairly and reasonably. When an accommodation request is not properly handled, it often leads to the end of the employment relationship along with either a human rights application at the Tribunal and/or a civil action in court for wrongful or constructive dismissal.

Keep in mind that individuals can obtain damages both for breach of human rights and wrongful/constructive dismissal separately, which increases an employer's potential exposure – not only for monetary damages, but also for negative media coverage which can be especially concerning for employers in the social services sector.

Therefore, proactively managing requests for accommodation (both procedurally and substantively) at the beginning of the process can increase employee morale, ensure minimal disruption to the business and avoid future legal liability (and costs!) for the employer.

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

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[1] (2013), 232 L.A.C. (4th) 1 (Marcotte).

[2] *Syed v. Khetia Pharmacy*, 2010 HRTO 2401 at para. 7.

[3] *Matheson v. School District No. 53 (Okanagan Similkameen) and Collis*, 2009 BCHRT 112 at para. 14

[4] Absent an employee self-identifying as a person with a disability, the employer may nevertheless have an obligation to inquire into whether a psychological disability underlies the employee's performance issues. If an employee is exhibiting signs of an undiagnosed or undisclosed mental illness, the employer ought to inquire whether the employee requires accommodation in performing his or her job duties.

[5] *Complex Services Inc. v. Ontario Public Service Employees Union, Local 278*, 2012 CanLII 8645 at para. 118-19 ("*Complex Services*").

[6] *Crowley v. Liquor Control Board of Ontario*, 2011 HRTO 1429 at para. 63.

[7] *Complex Services, supra, note 4 at para. 95.*

[8] *Complex Services, supra*, note 4.

[9] *Complex Services, supra,* note 4 at para. 116.

[10] *Re Toronto District School Board and C.U.P.E., Local 4400 (Cunningham)* (2011), 107 C.L.A.S. 81 (M.E. Cummings).

[11] *Complex Services, supra,* note 4 at para. 116.

[12] *Re Canada Post Corp. and C.U.P.W. (Crawford)* (2010), 198 L.A.C. (4th) 258 (Hornung).

[13] *Ibid.* at 269.

[14] *Re Sifto Canada Corp. and C.E.P., Local 16-0 (Glousher*) (2010), 200 L.A.C. (4th) 305 (Luborsky).

[15] *Ibid.* at 52.

[16] *Re Richmond Hill (Town) and C.U.P.E., Local 905* (2004), 78 C.L.A.S. 243 (Brent).

[17] *Ibid.* at para. 33.

[18] *Conforti v Investia Financial Services Inc,* 2011 CanLII 60897 (ON LRB).

[19] *Ljuboja v Aim Group Inc,* 2013 CanLII 76529 (ON LRB), *Abick v Ministry of Government Services (Ontario Government*), 2013 CanLII 76546 (ON LRB).

[20] *Ontario (Labour) v. Flex-N-Gate Canada Company*, 2014 ONCA 53 (CanLII).

[21] 2013 HRTO 1880 (CanLII).
