Reaching Out

Reaching Out – Sixth Edition

Date: July 29, 2014

Dear Friends,

With summer heating up, burning human resources issues continue to smolder as well. At Hicks Morley, we hope that you are enjoying the summer sunshine and we welcome you to the Summer 2014 Edition of *Reaching Out*, designed to address a number of relevant practical issues of particular interest and application to management in the Social Service Sector.

In our first article, for those of our readers that are Developmental Service Agencies, did you know that the Quality Assurance Measures regulations established under the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act* set out special rules for how you must proceed where you learn of potential employee misconduct related to abuse? In this edition of *Reaching Out*, Leanne Fisher of our Ottawa Office outlines the requirements of the Quality Assurance Measures and how they may impact your organization and your management of the employment-related investigation and discipline process.

Picking up on the theme of investigations, Jacqueline Luksha of our Toronto office reviews whether or not there is a free-standing obligation to investigate complaints of discrimination and harassment under the *Human Rights Code* and how the obligation to investigate may impact your handling of complaints as an employer or service provider.

Many social service agencies are regulated by the *Broader Public Sector Accountability Act, 2010*. Retirement parties, birthday celebrations, holiday parties, Board meeting meals and travel expenses are commonplace – but can you claim them as expenses? In her article, Brenda Bowlby (Retd) of our Toronto office guides you through the potential minefield of claiming "hospitality expenses" which are subject to a Directive issued by the Management Board of Cabinet.

The challenges of recognizing and addressing the accommodation of mental health disabilities is one that all agencies grapple with, both in the role of employer and as a service provider. Mental health disabilities are often not "visible" and thus present unique challenges which may necessitate a different response than when dealing with physical disabilities. In our final article, Samantha Crumb of our Toronto office reviews the Ontario Human Rights Commission's recently issued policy on the accommodation of mental health disabilities.

As always, it is our hope that you find our quarterly *Reaching Out* newsletter useful and informative. It is our aim to focus on issues that are topical and of interest to the Social Service Sector specifically. Please do not hesitate to contact me at lauri-reesor@hicksmorley.com (or your regular Hicks Morley lawyer) with suggestions for future article topics or questions about the articles appearing in this Summer Edition. Enjoy the rest of your summer and we will be back in touch with the Fall Edition.

Lauri A. Reesor
Editor

IN THIS ISSUE

QUALITY ASSURANCE MEASURES AND DEVELOPMENTAL SERVICES AGENCIES' INVESTIGATIONS INTO 'ABUSE' ALLEGATIONS

By: Leanne N. Fisher

Where an employer becomes aware of or suspects misconduct on the part of an employee, it should immediately initiate an internal investigation into the matter to determine, from an employment/labour law perspective, what next steps may be necessary (e.g. discharge from employment, disciplinary suspension etc.). These steps are premised on the following:

- an employer's duty to properly investigate matters prior to determining whether employment sanctions should be imposed;
- the duty to provide employees with due process rights (e.g. an opportunity to know the allegations against them, and a reasonable opportunity to respond to the allegations) prior to determining what sanctions (if any) should be imposed; and
- the duty to impose any employee sanctions or discipline without unreasonable delay that would prejudice the employee.

The Quality Assurance Measures regulations established under the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act* ("QAM"), make special rules for how developmental service agencies in Ontario ("Agencies") must proceed where they learn of potential employee misconduct which would amount to both 'abuse' as defined by the QAM and a criminal offence as defined under the *Criminal Code* of Canada. In particular, pursuant to the QAM, **an Agency cannot initiate its own investigation into such matters, until such time as a police investigation into the matter has been completed.**

Section 8(4) of the QAM states:

Where a service agency suspects any alleged, suspected or witnessed incidents of abuse of a person with a developmental disability may constitute a criminal offence:

(a) the service agency shall **immediately report to the police** the alleged, suspected or witnessed incident of abuse; and

(b) the service agency shall **not initiate an internal investigation** before the police have completed their investigation. [emphasis added]

There are many types of conduct that may constitute both 'abuse' under the QAM and criminal offences under the *Criminal Code*. The QAM defines 'abuse' as any action or behaviour, including neglectful conduct, that causes or is likely to cause a person with a developmental disability:

- physical injury and/or
- psychological harm and/or
- loss or destruction of property.

The *Criminal Code* prohibits many of the same types of conduct – including physical assaults, threats of assaults, sexual offences, criminal negligence (which may include neglect situations), theft and fraud. There are others.

There is a significant overlap between 'abuse' as defined by the QAM and the offences proscribed by the *Criminal Code*. Therefore, Agencies which suspect or become aware of 'abuse' allegations are often unable to **initiate an investigation** into the employment/labour law aspect of the allegations until **after a police investigation has been completed**.

The requirement that an Agency defer its internal investigation in cases of alleged abuse most certainly serves the important

purpose of ensuring that a police investigation is not contaminated by the Agency seeking out information or questioning witnesses and so on. However, practically speaking, deferring an internal employment investigation until the completion of a police investigation creates certain challenges for Agencies. That is, an Agency may be placed in the situation of having *some* information pertaining to alleged abuse – perhaps enough to cause it to believe that the employee should be removed from active employment – but *not enough information* to determine what ultimate result should flow in the circumstances (e.g. discharge? disciplinary suspension?).

To date, there have been no arbitration or court cases which clarify the rights of an Agency or an employee during the period between the time the Agency learns of the alleged abusive conduct and the time that the police complete their investigation. This time period can vary greatly – from days, to weeks, to months – and, in some cases, longer.

Until there is further guidance provided on employer/employee rights during this 'waiting period', Agencies are well advised to carefully consider and approach each situation on a case by case basis, in a manner that balances:

- the Agency's concern for the welfare of the persons they support and the Agency's reputation, more generally; and
- the employee's interests in maintaining his or her livelihood during any police investigation, his or her right to due process and his or her right to be presumed innocent.

Depending on the nature of the allegations, the employee's job duties and the evidence in the Agency's possession at the time the police investigation commences, potential options for dealing with an employee against whom allegations of abuse have been levied (but which have not been investigated by the Agency) may include increased supervision, temporary removal of certain job duties, temporary transfer to administrative duties, suspension with or without pay and, in rare cases, discharge from employment.

Whatever option an Agency ultimately chooses to pursue, as the employer it must be prepared to justify its action by proving that a less intrusive option was not reasonable in the circumstances (having regard to the balancing of interests, noted above). Care must also be taken to ensure that any 'interim' measures imposed by an Agency pending the completion of a police investigation are positioned and communicated in a manner which avoids allegations of 'double jeopardy' going forward – i.e. that the employer has imposed discipline *twice* for the same misconduct. Finally, any action taken by an Agency in response to allegations of abuse, but before it has been permitted to investigate the allegations, must always be tempered by a recognition that the allegations may, in fact, not be true.

INVESTIGATING COMPLAINTS OF HARASSMENT AND DISCRIMINATION

By: Jacqueline J. Luksha

Employers and service providers have a general obligation to provide services and a workplace free of harassment and discrimination.[1] This obligation necessarily imposes a coresponding duty to investigate complaints of harassment and/or discrimination. [2]

In order to fulfil the duty to address and investigate harassment and discrimination complaints, employers/service providers are obliged to take "reasonable steps".[3] The Human Rights Tribunal of Ontario ("Tribunal") has made clear that it does not expect perfection, just reasonableness[4] and has provided a list of factors that it will consider in determining whether the employer/service provider has taken reasonable steps in addressing and investigating a complaint. These considerations include:

- whether the employer had a human rights policy and a complaint mechanism in place;
- whether the investigators had appropriate training;
- the seriousness or promptness with which the employer investigated the complaint; and
- the employer's communication about, and resolution of, the complaint.[5]

There are multiple cases in which the Tribunal, having found that discrimination occurred, has made separate damage awards specifically for the failure to respond to and address a complaint properly.

Recent cases have raised the question of whether there is a free-standing duty to investigate. *Scaduto v. Insurance Search Bureau*[6] involved a situation where the employer had failed to investigate a complaint but where no discrimination or harassment had occurred. The Tribunal considered whether there could still be a breach of the *Human Rights Code* ("*Code*") in light of the fact there was no failure to provide a workplace free from discrimination.

In *Scaduto*, a former employee alleged that his employer subjected his work performance to greater scrutiny, terminated him on the basis of his sexual orientation and failed to investigate his complaints. The Tribunal rejected the employee's allegation that the employer's failure to conduct a post-termination investigation constituted a violation of the *Code*, stating "To find a violation of the *Code*, there must be a finding of discrimination. In the absence of a finding of discrimination, there is no violation of the *Code*."[7]

What the *Scaduto* case makes clear is that the *Code* is not contravened by (and no liability arises from) the failure to investigate discrimination where no discrimination has in fact occurred. However, an employer/service provider's failure to take reasonable steps to investigate a complaint of discrimination can contravene the *Code* when that failure causes or contributes to discrimination which is found to have occurred.

The Tribunal recently made additional comments consistent with the reasoning in *Scaduto* in *Toop v. Canadian Union of Public Employees*[8], stating that it is clear from the origin of the duty to investigate in the employment context that there is "not a free-standing obligation under the *Code*. Rather, it is the means by which an employer ensures that it is complying with its obligation to provide a discrimination-free work environment." The Tribunal went on to state that the corollary is that where an employer is found to have breached the *Code* by failing to investigate, the Tribunal is really finding that the employer failed to provide a discrimination-free workplace.

This provides context to the *Scaduto* decision. In that case, the applicant was no longer in the workplace and therefore it could not be said that his right to be free from discrimination in the workplace was infringed by the failure to investigate. In *Falodun v. Andorra*[9], the Tribunal applied *Scaduto* for this proposition and found that a complaint regarding a failure to accommodate raised no reasonable prospect of success because the employee was no longer in the workplace.

The key takeaway from the jurisprudence is that if the employer or service provider fails to investigate a complaint, it runs the risk of exacerbating the discrimination and increasing its liability. Therefore, absent absolute certainty that discrimination did not occur, the employer/service provider should always carry out a reasonable investigation. It will rarely be the case where an employer or service provider can state with certainty that discrimination did not occur without commencing an investigation to some extent. That being said, the extent of the investigation can be proportionate to the nature and complexity of the issues involved.

In light of the *Scaduto* case, employers and service providers are well advised to:

- draft, maintain and provide training on harassment and discrimination policies;
- ensure that the policies provide for a complaint mechanism;
- respond promptly and seriously to all complaints; and
- clearly communicate its actions to the complainant.

This will help ensure that the policies are working, the *Code* duties are being fulfilled, and that if the employer/service provider finds itself before the Tribunal, it is well prepared to prove either that no discrimination in fact occurred or, if it did, it was addressed appropriately.

"HOSPITALITY EXPENSES" UNDER THE *BROADER PUBLIC SECTOR*

ACCOUNTABILITY ACT, 2010

By: Brenda J. Bowlby

Organizations which are regulated by the *Broader Public Sector Accountability Act, 2010* ("Act") are subject to a Directive issued by the Management Board of Cabinet which obliges them to make rules regarding expenses for meals, travel and hospitality and which sets out requirements for those rules. A "Q & A" document, also issued by the government, assists in interpreting the Directive.

However, there is a lack of clarity in the Directive and the Q & A regarding what constitutes "hospitality" and what can be claimed as a "hospitality" expense or otherwise.

The Directive defines "hospitality" as follows:

4.4 Hospitality

For the purposes of this directive, *hospitality* is the provision of food, beverage, accommodation, transportation and other amenities paid out of public funds to people who are not engaged to work for:

- designated BPS organizations (i.e. those covered by this directive), or
- any of the Ontario government ministries, agencies and public entities covered by the OPS Travel, Meal and Hospitality Expenses Directive (available on the Ministry of Government Services website).

The expense rules must provide that functions involving only those people in the organizations listed above are not considered hospitality functions and cannot be reimbursed. This means that hospitality may never be offered solely for the benefit of anyone covered by this directive, or by the OPS Travel, Meal and Hospitality Expenses Directive. Examples would be: office social events, retirement parties and holiday lunches.

This definition of hospitality limits what expenses may be claimed as "hospitality" expenses in two ways. First, the expense must relate to the provision of "food, beverage, accommodation, transportation or other amenities" associated with extending hospitality to certain persons. Second an expense can only be claimed as "hospitality" if the expense relates **only** to someone who is **not** covered by the Act. The Act includes employees and Board of Director members of any organization covered by the Act, together with all Ontario government employees. Only if the expense was incurred as a result of providing hospitality to or for the benefit of a person or persons who fall outside of the list, can it be considered to be a "hospitality expense."

This means that any social functions (e.g. retirement parties, holiday parties, etc.) held for the benefit only of employees of the organization cannot be paid for as a hospitality expense. In fact, the Directive and Q & A make clear that such expenses should not be paid for out of public funds at all. This is to be contrasted with an event to which members of the public are invited: for example, the organization's Annual General Meeting, if the public is invited to this meeting, or a public celebration of the organization's anniversary event to which members of the public are invited (even if employees or Directors also attend).

There are other expenses which fall outside of "hospitality" which may be incurred or reimbursed as legitimate business expenses under a different category of expense. For example, if any member of the Board of Directors or employee of the organization is required as part of the business of the organization to attend an event and must purchase a ticket to do so, this may qualify as a legitimate business expense. Similarly, refreshments at Board of Directors meetings or other business meetings held by the organization may be considered business expenses. Two critical considerations will apply: first, is the expense incurred as a legitimate business expense and second, does the expense take into account the following caveat set out in the Q & A:

Any decisions about expenses should be made with due consideration for the prudent and responsible use of taxpayer

dollars, and for government direction on accountability and transparency. BPS organizations should also bear in mind the potential for public and media attention.

We recommend that every BPS organization should have rules in place for all types of expenses. This would mean that, if challenged, the organization could demonstrate accountability and provide a sound business case for the expense.

It will be a prudent step, therefore, for every BPS organization to put into place not only rules regarding meals, travel and hospitality expenses (which should be in place in all BPS organizations by now), but also rules regarding other business expenses which will be paid for by the organization.

THE COMMISSION SPEAKS ON PREVENTING DISCRIMINATION BASED ON MENTAL HEALTH DISABILITIES AND ADDICTIONS

By: Samantha M. Crumb

In June 2014, the Ontario Human Rights Commission ("Commission") issued a new policy entitled *Policy on Preventing Discrimination based on Mental Health Disabilities and Addictions* ("Policy"). The Policy provides guidance to employers, service providers and accommodation providers on managing and accommodating individuals with mental health disabilities or addiction issues. In this article, we focus on the Policy's interpretation of an organization's obligations as a service provider to these individuals under the Ontario *Human Rights Code* (the "*Code*").

THE POLICY'S DEFINITION OF DISABILITY

The Policy recognizes people with mental health issues or addictions are a "diverse group, and experience disability, impairment and societal barriers in many different ways." These types of disabilities are often episodic and/or "invisible" or kept hidden from others; however, they are deserving of the same protection afforded to more easily visible disabilities.

The Commission's Policy adopts what is often referred to as the "social approach" to disability, which recognizes that the concept of what constitutes a disability evolves as social attitudes and perceptions evolve, and that "discrimination is based as much on perceptions, myths and stereotypes, as on the existence of actual functional limitations." It contemplates that the categories of mental health disabilities and addictions protected by the *Code*, and thus covered by the Policy, will evolve over time.

WHAT CONSTITUTES DISCRIMINATION?

The Policy adopts the understanding of discrimination that has evolved from the case law. This means that to establish *prima facie* discrimination in this context, the claimant must show that:

- he or she has a mental health disability or addiction;
- he or she has experienced an adverse impact within a social area protected by the *Code* (e.g. in the provision of a service); and
- his or her mental health disability or addiction was a factor in the adverse impact.

Interestingly, the Policy includes, in its discussion of the more widely known forms of discrimination, a lengthy discussion of what it refers to as "mental health profiling," which is akin to the more widely known concept of "racial profiling." Mental health profiling is defined as "any action undertaken for reasons of safety, security or public protection that relies on stereotypes about a person's mental health or addiction rather than on reasonable grounds, to single out a person for greater scrutiny or different treatment." The Policy notes that individuals with perceived or known mental health or addiction issues are often stereotyped as being a risk to public security and safety in the absence of objective evidence to support this perception. It draws on the factors used in the racial profiling case law as relevant to consider whether profiling based on

mental health was a reason for any alleged mistreatment.

The Policy emphasizes that objective evidence or criteria must be used to assess the risk posed by an individual, rather than blanket assumptions based on a person's mental health disability or perceived mental health issues. At the same time, it recognizes that it is not discriminatory to respond to the actual behaviour of individuals with mental health disabilities that causes risk.

THE DUTY TO ACCOMMODATE

The Policy addresses the issue of accommodation by employers and service providers more specifically in relation to mental health disabilities and addictions. Importantly, the Policy emphasizes that "there cannot be a 'double standard' for how mental health disabilities are treated versus how physical disabilities are treated."

As a result, the *Code* requires "that the most appropriate accommodation be determined and provided, unless that causes undue hardship." The Policy defines "the most appropriate accommodation" as the one that most respects dignity (including autonomy, comfort and confidentiality), responds to a person's individualized needs, and allows for integration and full participation of the individual. The Policy also states that "the highest point on the continuum of accommodation must be achieved, short of undue hardship." Importantly, however, it expressly recognizes that "if there is a choice between two accommodations that equally respond to the individual's needs in a dignified way, then the accommodation provider is entitled to select the one that is less expensive or less disruptive to the organization."

The Policy sets out a number of duties and responsibilities of service providers, drawn from both the Commission's interpretation of the *Code* and reflective, for the most part, of the jurisprudence of the Human Rights Tribunal of Ontario ("Tribunal") relating to the accommodation of both mental and physical disabilities. As generally stated by the Policy, these include:

- be alert to the possibility that a person may need an accommodation even if he or she has not made a specific or formal request;
- accept the person's request for accommodation in good faith, unless there are legitimate reasons for acting otherwise;
- get expert opinion or advice where needed (but not as a routine matter);
- take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated, and canvass various forms of possible accommodation and alternative solutions;
- keep a record of the accommodation request and action taken;
- maintain confidentiality and only disclose information as required to facilitate any accommodation;
- limit requests for information to those reasonably related to the nature of the limitation or restriction, to be able to respond to the accommodation request;
- implement accommodations in a timely way, to the point of undue hardship; and
- bear the cost of any required medical information or documentation beyond the initial documentation required to establish a need for accommodation.

As part of this accommodation process, the service provider may need to educate itself about the nature of an individual's disability, take steps to resolve any tension or conflict with others whose cooperation is required to implement an accommodation, and dispel any misperceptions or stereotypes that others may have about persons with disabilities.

UNDUE HARDSHIP

In terms of undue hardship, the Policy repeats the Commission's traditional view that only the three factors expressly listed in the *Code* – cost, outside sources of funding, if any, and health and safety requirements, if any – are relevant to the undue hardship analysis. However, despite these statements, the Policy also recognizes a number of other limits on the duty to accommodate which have been recognized in the human rights case law. For example:

- A measure that would not otherwise constitute undue hardship based on cost or health and safety may not be required if it would fundamentally alter the nature of the service or would still not allow the person to fulfil the essential duties attending the exercise of the right.
- A service provider's duty to accommodate may end where the person seeking accommodation fails to participate in or cooperate with the accommodation process. This may include refusal to comply with reasonable requests for information to show and/or meet their accommodation needs or refusal to take part in developing accommodation solutions.
- There may be rare instances where an accommodation request cannot be implemented in whole or in part because doing so would create a conflict with the legal rights of others.

CONSENT AND CAPACITY

The Policy briefly addresses the interaction of the Ontario legislative scheme governing matters relating to mental capacity and the *Code*. It emphasizes that while many individuals have the ability to make important life decisions, some individuals may, due to their disability, be deemed to lack such capacity in certain situations.

As a result, capacity should be measured on a case-by-case basis, "with an eye to the purpose of the relationship or transaction in question." Further, service providers should endeavour to create environments designed to facilitate participation in decision-making by, for example, offering plain-language self-help resources, or involving a support network to assist an individual in making a decision. Finally, before determining that a person lacks capacity, a service provider must explore potential accommodation options to the point of undue hardship.

CONCLUSION

The Commission's mission is to "promote, protect and advance human rights" by, among other things, developing policies and conducting public education with respect to the rights protected under the *Code*. To this end, the Commission has created a number of the policies reflecting its interpretation of various requirements under the *Code*, including the Policy. The Tribunal may consider any applicable Commission policy in its decision-making process and is, in fact, mandated to do so if a party or intervenor requests it. Furthermore, when the Commission is a party or an intervenor in a matter before the Tribunal, it may ask the Tribunal to refer its decision to the Divisional Court if the Commission believes that the decision is inconsistent with one or more of its policies. The Divisional Court would then determine whether the Commission's interpretation of the *Code* should prevail.

As the Policy identifies at the outset, research estimates that "almost one in five Canadian adults will experience a mental illness or addiction at some point in their lives." While the Policy is not strictly binding on the Tribunal, the Commission's interpretation of the *Code* offers helpful guidance to service providers for identifying and managing individuals with mental health disabilities or addictions.

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[1] Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 at ss. 5(1) and (2).

[2] *Laskowska v. Marineland of Canada Inc*., 2005 HRTO 30 (CanLII) at para. 51 and *Abdallah v. Thames Valley District School Board*, 2008 HRTO 230 (CanLII).

[3] *Harriott v. National Money Mart*, 2010 HRTO 353 (CanLII).

[4] *Laskowska v. Marineland of Canada Inc*., *supra*.

[5] *Ibid*.

[6] *Scaduto v. Insurance Search Bureau*, 2014 HRTO 250 (CanLII) ("*Scaduto*").

[7] *Scaduto* at para. 77.

[8] *Toop v. Canadian Union of Public Employees*, 2014 HRTO 145 (CanLII).

[9] *Falodun v. Andorra*, 2014 HRTO 322 (CanLII).