Reaching Out

Reaching Out – Eighth Edition

Date: May 25, 2015

Dear Friends,

Before everyone becomes distracted by the beautiful weather and blooming flowers, we wanted to provide you with our Spring Edition of *Reaching Out*. We hope that it will give you some valuable information that you can put to good use during the hazy days of summer.

Leanne N. Fisher, an Associate in our Ottawa office has highlighted some important obligations under the *Accessibility for Ontarians with Disabilities Act* that are looming for private and not-for-profit sector workplaces with 50 or more employees regarding accommodation issues in the workplace. With a compliance deadline of January 1, 2016, such employers should ensure that they are reviewing their policies to determine if any changes need to be made. For private and not-for-profit sector workplaces with less than 50 employees, the obligations are not as onerous, and the date for compliance is not until January 1, 2017. But, with fewer resources, such employers may wish to put the extra time to good use to ensure they are complaint when the time comes.

On a related note, Colin J. Youngman, an Associate in our Kingston office, has reviewed a couple of recent decisions of the Human Rights Tribunal of Ontario that provide helpful guidance on an employer's duty to accommodate and the importance of determining the essential duties of the position. While the issue of accommodation in the workplace is a very fact specific exercise (and one which can have significant consequences to employers), these cases reinforce the notion that an employer which must accommodate a disabled employee can still expect the employee to be able to perform the essential duties of the position.

Another area that can have significant consequences for employers in the social services sector is pay equity. We have touched on this legislation in past issues of *Reaching Out.* Stephanie N. Jeronimo, an Associate in our Toronto office, has some advice for employers using the proxy method of comparison. The good news for those fortunate enough to have achieved pay equity (by making their annual pay equity adjustments of 1% of the previous year's payroll) is that they do not have to go back and cover the gaps that existed from 1994 until pay equity was achieved. However, what is not clear is whether they have to go back to their proxy employers to obtain current job rates and information. That issue was litigated before the Pay Equity Tribunal last year and we are anticipating a decision shortly.

Last but not least, the issues of sexual harassment and violence have come to the forefront again

with some very high profile cases in recent months. Naheed Yaqubian, an Articling Student in our Toronto office has provided an overview of the initiatives recently announced by the Ontario government intended to raise awareness of sexual violence and harassment, combat sexual discrimination, harassment and violence, and improve support for victims.

We hope that you find this issue of *Reaching Out* informative and helpful in your daily operations. If you have any ideas for future editions, please do not hesitate to contact me at michael-smyth@hicksmorley.com. It is our goal to make this publication responsive to the needs of employers in the social services sector, and your input is welcomed.

Until we reach out to you again with the next edition, I hope you find some time to relax on a sunny patio.

Michael S. Smyth
Editor

IN THIS ISSUE:

DEADLINE APPROACHING FOR COMPLIANCE WITH EMPLOYMENT STANDARD UNDER *ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES ACT*

By: Leanne N. Fisher

The *Accessibility for Ontarians with Disabilities Act, 2005* ("AODA"), is legislation that aims to break down barriers that prevent or limit persons with disabilities from participating in a variety of activities through the enactment of accessibility standards that are enforceable as law. One such regulation, the Integrated Accessibility Standards Regulation contains an employment standard which will soon affect all private and not-for profit employers.

By virtue of the *Human Rights Code ("Code"),* Ontario employers have long had the duty to accommodate disabled employees (and potential employees) to the point of undue hardship, whether that be by modifying job duties, adjusting working hours, or adjusting application processes/tests, to name just a few examples. However, the extent to which an employer chooses to commit those obligations/processes to writing and/or communicate those obligations to

employees (and potential employees) has historically largely been left to employer discretion. Likewise, although human rights jurisprudence is clear that the accommodation exercise encompasses both substantive and procedural duties, the process that an employer follows to satisfy those duties has also been largely discretionary.

For example, employers are encouraged, but not required, under the *Code* to have written policies about accommodation or to make those policies known to employees. Accordingly, if an employee requires accommodation, he or she may have to seek out any information that may or may not exist about the employer's accommodation policies/process themselves. If the employee goes on to make an accommodation request, he or she may do so with little or no idea as to what will ensue in terms of process. He or she may or may not know, for instance:

- who will have access to his or her medical information;
- whether he or she has a right to assistance (from a union representative, or other individual) in meeting with the employer about accommodation;
- at what point, if at all, the employer will have the right to ask for an outside expert report;
- how or when he or she will be advised of the outcome of his or her request; or
- when, if at or, the accommodation is to be reviewed.

Indeed, even the employer may not have contemplated many of these questions at the time it embarks upon the accommodation exercise. In practice, an employer's accommodation 'process' may often consist of little more than:

1. the employer corresponding (with employee consent) with the employee's physician to obtain information about the employee's restrictions and abilities; and
2. the employer determining, based on those stated restrictions, what modifications, if any, should be provided to the employee and for what duration.

The employee's role in the accommodation process may in practice be quite minimal – *e.g*. he or she may simply provide the consent for the employer to seek out information from his or her physician, and then wait to hear from the employer as to what accommodations will (or will not) be provided. This practice often persists even though human rights jurisprudence makes it clear that employees have the right to participate (as well as a duty to cooperate) in the accommodation process.

However the AODA's employment standard within the Integrated Accessibility Standards Regulation (the "Employment Standard") aims to bring these practices to an end in private/not-for-profit sector workplaces with 50 or more employees ("Large Employers"), effective January 1, 2016. Private/not-for-profit sector workplaces with less than 50 employees ("Small Employers") must be compliant by January 1, 2017, although not all of the requirements of the Employment Standard will apply to them.

Ontario government workplaces were required to be in compliance with the Employment Standard by January 1, 2013, and designated large and small public sector organizations were required to be in compliance by January 1, 2014 and January 1, 2015, respectively.

The Employment Standard requires that all employers proactively inform all new and existing employees – whether by newsletter, emails, staff memos, websites and/or staff meetings – of its policies used to support employees with disabilities, including, but not limited to, its policies on the provision of job accommodations. They must also provide updated information whenever there is a change to an existing policy. Accordingly, once the compliance dates take effect, there should be no instance where an employee in Ontario is unaware of his or her employer's accommodation policy or other policy for supporting persons with disabilities.

The Employment Standard will require Large Employers to ensure that employees are aware of certain basic procedural rights and obligations that will be included within their accommodation process *before* embarking upon that process. Large Employers must have in place, on or before January 1, 2016, a written process for the development of documented 'individual accommodation plans' for all employees with disabilities. This written process must include information on:

- the steps that will be taken to protect the privacy of the employee's personal information;
- the manner in which the individual employee can participate in the process;
- how an outside medical or other expert can be requested at the employer's expense;
- how an individual can request representation in the development of the plan;
- how and what will be communicated if a decision is made to deny a plan;
- the frequency and manner of review of the plan;
- the manner in which individualized assessment will occur;
- how the plan will be provided in an accessible format (if requested);
- other accommodation being provided (if any); and
- an emergency response/plan for the individual (if applicable).

Large Employers must also develop and have in place a return to work process for its employees who have been absent from work due to a disability and require disability-related accommodations in order to return to work, and shall document the process.

Large Employers should be prepared to communicate their written process to employees on or before January 1, 2016. In preparing to do so, they should also be turning their minds to how their revised processes (containing the elements outlined above) will impact on or interact with existing collective agreement and/or other policy provisions.

Finally, all employers should be aware that there are other requirements contained in the AODA Employment Standard which address recruitment, accessible formats, performance management, and career advancement. These requirements, like the ones discussed in this article, also establish significant proactive duties on the part of employers as they relate to employees (and potential

employees) with disabilities.

For more information on employers' obligations under the AODA, we have published a number of *FTR Nows* on our website. Should you have any additional questions, please do not hesitate to contact your regular Hicks Morley lawyer.

By: Colin J. Youngman

One of the most confusing areas for employers is the duty to accommodate under the *Human Rights Code*. While the issues are always fact specific, a recent decision from the Human Rights Tribunal of Ontario (the "Tribunal") has provided some useful guidance and clarification regarding whether the obligation extends to altering the essential duties of a position. The short answer is that it does not.

Section 17 of the *Human Rights Code* ("*Code*") provides that an employee's right not to be discriminated against on the basis of disability is not infringed by reason only that the employee is incapable of performing the essential duties or requirements of a position. However, before finding that person incapable of performing the essential duties of a position, the Tribunal must be satisfied that the needs of the person cannot be accommodated without undue hardship on the employer.

In *Briffa v. Costco Wholesale Canada Ltd.*[1] the applicant was employed in a position which required her to receive, process and handle returned merchandise. The applicant's disability had an impact on her ability to perform work handling the merchandise, such as returning it to shelves, but did still allow her to perform the paperwork duties associated with her job, which was less than half of the job. The applicant argued that the respondent employer should have accommodated her by letting her do the paperwork part of the job.

The employer argued that the applicant could not perform the essential duties of her position and as a result the *Code* was not breached. The Tribunal reviewed the duty to accommodate and specifically section 17 of the *Code*:

In my view, the issue in this case is not solely whether the accommodation identified as appropriate by the applicant would cause the respondent undue hardship, but rather whether it would allow the applicant to perform the essential duties of her job, including, if necessary, with accommodation, to the point of undue hardship. […]

Clearly, the Legislature's use of the language of "essential duties" rather than all duties has some meaning. It implies that accommodation may require an employer to accept that an employee may not be able to perform every single task that would normally be within his or her job description. Nor does it require the opposite.

Ultimately the Tribunal found the accommodation sought by the applicant would require the employer to assign part of the essential duties of the position permanently to other employees, a step that the *Code* does not require an employer to take. Accordingly the Tribunal found that the respondent had not breached the *Code*.

In a very recent decision, *Pourasadi v. Bentley Leathers,*[2] the applicant, a retail store manager, requested an accommodation for a disability which prevented her from assisting customers with certain products and performing some merchandising and housekeeping tasks when working alone. Approximately 65-70% of the applicant's job included sales and customer service work and 25-30% involved the more physical duties. The applicant typically worked alone from 10 a.m. to 2:15 p.m. four days per week and from 9:30 a.m. to 12:00 p.m. on Saturday.

The applicant argued that if she worked alone she should have been permitted to: (1) turn away customers who required assistance that was outside her physical restrictions; and (2) defer the merchandising and housekeeping tasks that were outside her physical restrictions to other employees.

The Tribunal discussed what is required of employers when they are accommodating employees:

[…] the duty to accommodate may require arranging an employee's workplace in a way that enables the employee to perform the essential duties of his or her work. However, it does not require permanently changing the essential duties of a position or permanently assigning the essential duties of a position to other employees. The duty to accommodate also does not require exempting employees from performing the essential duties of their position.

Importantly, the Tribunal also held that not all duties that an employer may assign to a position will necessarily be "essential duties" and that each case must be determined on its own facts. It was an essential duty of the position to assist customers and the duty was required to be performed whenever there was a need for it. As providing the applicant's requested accommodation would amount to exempting her from performing the essential duties of her position, the employer was not required to implement the applicant's requested accommodation.

These cases highlight that identifying the essential duties of a position is a critical step in the duty to accommodate process. Simply because a duty is performed does not mean it is essential. Accordingly, employers should be prepared to provide evidence that a duty is a necessary and indispensable function of the position before deciding it is an essential duty.

These cases also demonstrate that once a duty is established to be an essential duty, an employee must be able to perform it, with or without accommodation, whenever it is required. Put another way, the employer is not required to permanently change the essential duties of a position, assign those essential duties to other employees or exempt the employee from performing the essential duties.

PAY EQUITY OBLIGATIONS: A REMINDER FOR EMPLOYERS USING THE PROXY METHOD OF COMPARISON

By: Stephanie N. Jeronimo

In 1987, the *Pay Equity Act* (the "Act") was introduced as a means of redressing "systemic gender discrimination in compensation for work performed by employees in female job classes." The Act imposes ongoing obligations on employers to proactively achieve and maintain pay equity. As an employer's liability under the Act is ongoing and has no limitation period, it is critical that employers do not lose sight of these obligations.

ACHIEVING PAY EQUITY UNDER THE PROXY METHOD

For broader public sector employers, such as social service agencies, which did not have sufficient male job classes to allow them to use the job to job or proportional value methods of comparison, the Act required the use of the proxy method of comparison. This method required a "seeking employer" to compare its female job classes with the male and female job classes of a "proxy employer," for the purposes of achieving pay equity.

In order to utilize this method, employers were required to obtain an order from the Pay Equity Commission declaring them to be a "seeking employer." Schedule A to the Act set out the various types of seeking employers and the appropriate type of proxy employer that were required to be used. Typically, however, the proxy employers were hospitals and municipalities.

The seeking employer was required to identify its "key female job class" which was either the female job class with the greatest number of employees or the female job class whose duties were most essential to service delivery. The proxy employer was required to provide the seeking employer with job information, including job rate and benefit information, for jobs it had that were similar to the key female job classes. Once in receipt of that information, the seeking employer was then required to evaluate the proxy employer job classes and set the job rates and ratings of its key female job classes proportionally to those of the proxy. After that, the remaining female job classes and job rates were set proportionally to those rates and ratings.

Through that process pay equity target rates were identified for all female job classes in the seeking employer.

The Act only requires those covered by the proxy method to pay out adjustments equivalent to 1% of the employer's payroll from the previous year in order to achieve pay equity. Although this means that it will often take many years to achieve pay equity, seeking employers are deemed to be in compliance with their obligations under the Act provided they have prepared and implemented a pay equity plan. Pay equity will be achieved when the job rates in the seeking

employer's establishment reach the target rates of the proxy employer.

However, the Act deems the target rates for achieving pay equity to increase whenever the seeking employer pays increases which are not for the purpose of pay equity. If, for example, a seeking employer provides cost of living increases, the target rates are deemed to be increased by those increases.

WE'VE ACHIEVED PAY EQUITY – NOW WHAT?

As seeking employers achieve pay equity, a question that has been asked is whether the Act requires a seeking employer to go back and pay employees adjustments to cover the "gaps" that existed from 1994 until pay equity was achieved. Seeking employers can breathe a collective sigh of relief – the answer is a definitive no.

There is nothing in the Act that requires this kind of catch up or balloon payment. Rather, the Act is clear that seeking employers were permitted to limit the payment of pay equity adjustments to 1% of their previous year's payroll for the purposes of achieving pay equity. As long as seeking employers made those adjustments annually, they satisfied their obligations under the Act. Retroactive payments would be required, however, for those years in which a seeking employer did not pay out its 1% requirement.

It was also important that, when paying out that 1% of previous years' payroll, the female job class with the lowest job rate received the greatest adjustment even if it was only a penny more.

But, what happens after an employer is fortunate enough to achieve pay equity? What must it do to maintain it? This was the issue in a recent proceeding before the Pay Equity Hearings Tribunal.

The view of the Pay Equity Commission is that seeking employers are not required to go back to their proxy employers for current job rates and job information. Hicks Morley has argued, on behalf of seeking employers, that maintenance of pay equity is an internal-looking exercise and that as long as the seeking employer continues to maintain the same relationship between job ratings and job rates paid proportionally, pay equity will have been maintained.

Employers are currently awaiting a decision from the Pay Equity Hearings Tribunal that will, hopefully, confirm the view of the Commission and employers. The hearing concluded in June 2014 so a decision is expected imminently.

We will provide a client update on this issue as soon as the decision is rendered. In the meantime, should you require assistance with your pay equity obligations, please contact Carolyn L. Kay, 416.864.7313, Lauri A. Reesor, 416.864.7288, Craig R. Lawrence, 416.864.7532 or Stephanie N. Jeronimo, 416.864.7350.

TAKING ACTION AGAINST SEXUAL HARASSMENT AND VIOLENCE: RECENT ONTARIO INITIATIVES

By: Naheed Yaqubian

Did you know that 28% of Canadians say they have been on the receiving end of unwelcome sexual advances, requests for sexual favours, or sexually-charged talk while on the job?[3]

In March 2015, Premier Kathleen Wynne announced a series of initiatives to raise awareness of sexual violence and harassment, combat sexual discrimination, harassment and violence, and improve support for victims. This action plan, *It's Never Okay: An Action Plan to Stop Sexual Harassment and Violence*, has been brought to the forefront by recent high-profile reports of workplace harassment and violence.

The government intends to spearhead initiatives such as a public education campaign, measures to improve government caucus policies, and internal training around workplace discrimination, harassment and violence prevention. This education and awareness campaign intends to challenge attitudes and encourage a longer-term generational shift to end deep-rooted attitudes and behaviors.

SAFER WORKPLACES

To promote safer workplaces, the government will introduce the following initiatives over the next three years:

1. Amend the *Occupational Health and Safety Act* (the "Act") to include a definition of sexual harassment and to set out explicit requirements for employers to investigate and address workplace harassment.
2. Create a new "Code of Practice" for employers to assist them in keeping workplaces harassment-free.
3. Establish a special team of inspectors trained to address complaints of workplace harassment by enforcing the Act's harassment provisions across the province.
4. Develop supporting educational materials to help employers create programs to keep workplaces harassment-free.
5. A special review of the government's internal policies, procedures and training for political staff, to ensure a government work environment free of violence, discrimination and harassment.
6. A Sexual Harassment Prevention Action Plan for the Ontario Public Service, one of the largest employers in the province.

SAFER COMMUNITIES

Services across Ontario are available to provide aid and support to victims of sexual violence. The government plans to enhance and reinforce these services by:

1. Increasing funding to Ontario's 42 sexual assault centres.
2. Increasing funding and services at Ontario's 35 hospital-based Sexual Assault/Domestic Violence Treatment Centres.
3. Introducing training materials for child welfare workers which address youth in care and leaving care, who tend to be more vulnerable to sexual violence and harassment.
4. Ensuring that current counseling services and help-lines are coordinated and integrated, providing services in over 150 languages.
5. Testing and funding new service-delivery models that attempt creative new approaches within our communities.
6. Increasing the focus on sexual violence at Ontario's 48 Domestic Violence Community Coordinating Committees, which locally organize and improve services to women in each community who experience domestic abuse.
7. Amending the *Residential Tenancies Act* to allow tenants who are fleeing sexual or domestic violence to break their lease with less than 60 days' notice.

TRAINING FOR PROFESSIONALS

Front-line workers across the health, education, justice and community services industries are at the forefront of the solution. Training for these workers will be provided to shift norms and help assist those who experience sexual violence, including intervention training if they witness individuals at risk in their day-to-day employment. Education and training materials are being developed for police, aimed at the swift prosecution of sexual assault cases and attention to victims and vulnerable populations.

ACCESS TO JUSTICE

The government has also introduced measures to make Ontario's criminal justice system more responsive to the issues of sexual assault and domestic violence. In the next few years, a pilot program to provide legal advice to survivors of sexual assault will be introduced, the limitation periods for civil sexual assault claims will be removed, and a best-practices tool for investigation will be developed for police and workplaces.

We will update you as more information becomes available on these proposed initiatives and their potential impact on social services employers. In the meantime, if you have questions about these proposed legislative changes, or would like to review your organization's policies in this regard, please contact your regular Hicks Morley lawyer.

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[1] 2012 HRTO 1970 (CanLii)

[2] 2015 HRTO 138 (CanLii)

[3] *It's Never Okay: An Action Plan to Stop Sexual Harassment and Violence, March 2015*, Government of Ontario, page 24
