Reaching Out

Reaching Out – Fourteenth Edition

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Dear Friends,

Welcome to our Winter 2019 edition of *Reaching Out*.

The last 18 months have been a tumultuous time in employment law in Ontario. We saw the introduction of sweeping changes to the *Employment Standards Act, 2000* and *Labour Relations Act, 1995* in January 2018, only to see many of them repealed in January 2019 with a return to the status quo.

The *Human Rights Code* itself was left unchanged in this flurry of activity, but there continue to be developments in the area of human rights. In this edition of *Reaching Out* we consider an employer's obligations to address human rights issues in a number of areas.

Sean Reginio and Paul Schwartzman explore a service provider's obligation to address harassment when it occurs solely between its customers or clients. A recent decision of the Divisional Court has provided some guidance on the steps that a service provider should take when dealing with inappropriate behaviour between customers.

The legalization of recreational marijuana should have prompted employers to review their policies to ensure that they appropriately address the issue of marijuana in the workplace. The use of medical marijuana by employees also raises challenging issues. Anna Jeffery provides a refresher for employers on accommodating the use of medical marijuana.

In previous editions of *Reaching Out* we looked at the first and second steps of the three-part analysis used by the Human Rights Tribunal of Ontario in its decision in *Laskowska v. Marineland of Canada In*c. to determine whether an employer has responded to a human rights complaint with reasonable diligence. In this edition we examine the third step in more detail – the resolution of the complaint and the restoration of the workplace. This final step is critical in trying to undo the damage that can be caused by discrimination or harassment in the workplace.

We hope that you find this edition of *Reaching Out* useful, and please do not hesitate to contact me if you have questions, or ideas for future editions.

Michael Smyth Editor

Harassment Between Customers/Clients: Your Obligation to Intervene

By: Paul S. Schwartzman and Sean Reginio

It is clear that an employer has an obligation to address harassment when it occurs between employees or between a customer/client and an employee. Does this obligation extend to situations where the harassment is happening solely between customers/clients?

Both the courts and the Human Rights Tribunal of Ontario (Tribunal) have acknowledged the need for organizations to respond appropriately when harassment or discrimination occurs between customers/clients, and it is incumbent on both service providers and their employees to be aware of their obligations.

If a customer/client is subject to a particularly egregious stand-alone incident or comment, or a persistent series of serious wrongful behaviour that creates a hostile or intolerable environment, service providers could be liable whether the environment is caused by an employee or by another customer/client. When training employees on how to appropriately interact with customers/clients, it is important that employees also receive instruction on how to appropriately address harassing interactions between customers/clients.

Service providers have an obligation to take prompt, effectual and proportionate action when they become aware of harassment between third party individuals on their premises. The response does not need to be perfect, but it does need to be reasonable in light of the circumstances. City of Toronto v. Joseph, a recent case which involved members of the public, provides some useful guidance for service providers.

In that case, a member of the public filed a complaint of discrimination against the City of Toronto with the Tribunal. The claimant and V.F., another member of the public, were waiting to be served and had been given numbers for their place in the queue. The complainant approached one of the counters to speak with a clerk about an issue. V.F. was waiting in a line in front of this counter and yelled at the complainant to wait his turn. V.F. directed a racial slur and made a crude gesture towards the complainant, and stated that he would be waiting for him outside in the parking lot. The complainant asked the clerk for assistance; however, the clerk simply said that if it escalated into something physical, they would call security, but "most people settle their own little disputes just amongst themselves."

The Tribunal found that the response of the clerk was not reasonable nor effectual, and was "inadequate" in terms of what the *Human Rights Code* requires. The Tribunal awarded the complainant $1,500 for injury to the complainant's dignity, feeling and self-respect.

The City sought judicial review of the decision with the Divisional Court, which overturned the decision. The Court determined that the City's response to this interaction was sufficiently prompt, effectual and proportionate to absolve the City of liability. While the non-managerial employee who was initially notified of the situation did not take steps to address it, a security officer was ultimately notified soon after by another employee and the security officer promptly responded to the incident in a satisfactory manner by asking V.F. to leave the premises.

When training staff on how to manage these difficult situations, it is important service providers encourage them to be:

1. Prompt
    - Responses must be timely, whether the response is by directly intervening or by immediately notifying another employee.
    - Hoping that the situation "handles itself" creates potential risk of a human rights complaint for the service provider.
    - When in doubt, it is always advisable for an employee to speak to a supervisor, the person responsible for security, or other co-worker.
2. Effectual
    - The response must contribute positively towards protecting customers/clients who are subjected to harassment or discrimination.
    - A response which instigates or escalates can increase the harm to customers/clients and, therefore, increase the service provider's liability.
    - A response that clearly will not result in a resolution of the immediate issue may potentially lead to liability.
3. Proportionate
    - A response that is satisfactory in one circumstance may be wholly inadequate in another – context is key.
    - For instance, politely asking the perpetrator of the harassment to leave may be successful in one

circumstance, but that may be an insufficient response if the perpetrator refuses and continues to harass other customers/clients.
- A perfectly calculated response is not necessary, but employees are expected to exercise reasonable judgment when responding to these incidents.

Marijuana in the Workplace

By: Anna Jeffery

Accommodating employees who use medical marijuana requires balancing an employee's rights under the *Human Rights Code* with an employer's obligations under the *Occupational Health and Safety Act* to take every precaution reasonable in the circumstances for the protection of workers. These obligations are especially pronounced in workplaces that include safety-sensitive positions.

Medical Marijuana

Below are practical steps that employers can take to manage the accommodation of employees who are prescribed medical marijuana.

1. Review Workplace Policies

Employers should review workplace policies and ensure that they permit the use of medically prescribed marijuana, where the need for use at work is medically substantiated by a health care practitioner.

Workplace policies should require employees to disclose their use of prescription medication (including medical marijuana), where such usage may give rise to impairment in the workplace.

Drug and alcohol policies should specify that the sharing, selling or distribution of marijuana in the workplace remains a prohibited activity and subject to disciplinary action. Given the legalization of recreational marijuana it is important that policies be updated to address this change.

Once these changes are made, it is also important that all policies and policy changes are communicated appropriately and consistently to all employees.

2. Request Medical Information

Where an employee requests accommodation for the use of medical marijuana, an employer has the right to ask for supporting documentation for its use during work hours, including but not limited to a copy of the licensing documentation.

An employer may also seek medical confirmation of whether the employee is fit to perform their duties while using medical marijuana.

3. Accommodation Rights and Obligations

Both employees and employers must facilitate the accommodation process and each have corresponding obligations.

(a) An Employee's Obligations

An employee seeking accommodation for medical marijuana must establish that they have a disability-related need to consume medical marijuana while at work that triggers protection under the *Human Rights Code*. The employee must also make this need known to the employer and request accommodation.

After doing so, the employee must co-operate in the accommodation process by providing supporting medical or other related information and/or documentation as requested, attending meetings and participating in the process to explore reasonable accommodations in good faith. The employee must also be capable of performing the job duties safely, without endangering others.

(b) An Employer's Obligations

An employer has a duty to accommodate to the point of undue hardship. However, that duty extends to the provision of "reasonable" accommodation, not the employee's preferred accommodation.

Employers should keep some important principles in mind during the accommodation process. First, accommodation may be reasonable. It is important to obtain sufficient information to explore options regarding how the medical marijuana is ingested, and when and where on the premises it can be consumed without interfering unduly with the employer's operations.

Second, where an employer prohibits an employee from using medical marijuana in the workplace, it must establish that the prohibition is based on substantiated health and safety concerns or other considerations that are rationally connected to the workplace and that the prohibition has been adopted in good faith (and not motivated by discriminatory animus).

Third, where applicable, an employer may establish that no accommodation is possible if an employee is impaired from the use of medical marijuana and is not medically fit to perform the work duties (a *bona fide* occupational requirement).

Recreational Marijuana in the Workplace

While the accommodation process outlined above is engaged when dealing with cases of medical marijuana, employers do not have to tolerate the recreational use of marijuana in their workplaces. Again, it is important for employers to review their workplace policies to ensure that the prohibitions on the recreational use of marijuana in the workplace are clear. These policies must be regularly communicated with employees.

An Employer's Obligation: Taking Appropriate Action Once a Complaint Has Been Received

By: Michael S. Smyth

In a previous Reaching Out article, Njeri Sojourner-Campbell reviewed the three-part analysis used by the Human Rights Tribunal of Ontario (Tribunal) *in* Laskowska v. Marineland of Canada Inc.(*Laskowska*) to determine whether an employer has responded to a human rights claim with reasonable diligence. In our Twelfth and Thirteenth editions of *Reaching Out,* we looked at the first and second parts of that analysis in more detail.

We now take a closer look at recent decisions that have considered the third part of the test – "Resolution of the Complaint and Restoration of the Workplace."

Allegations of discrimination and harassment, whether proven or not, can have a significant impact on the parties themselves and their ability to work together, or can even impact the workplace more broadly. The damage can have a long-lasting effect on productivity and engagement in the workplace. As a result, restoring the work environment at the conclusion of an investigation is just as important as a properly conducted investigation.

In her article Njeri asked employers to consider whether the following is true for their organization:

- Return-to-work transition plans are put in place for the parties involved in the issue. These plans consider whether the complainant and respondent can continue working together, or if alternate arrangements are necessary.
- While maintaining confidentiality, managers communicate the conclusion of an investigation to the parties[1] and witnesses[2] where appropriate.
- The organization follows up with the parties, especially the complainant,[3] in a timely manner to determine whether they have, in fact, been returned to a harassment- and discrimination-free workplace at the culmination of an investigation.[4]
- Members of the response team share the appropriate amount of information about the investigation's conclusions. They are aware that the parties are not entitled to know specific details of the actions taken against the respondent, the nature of the discipline or requirement imposed.[5]

A number of recent decisions of the Tribunal have considered whether an employer met the third part of the test articulated in *Laskowska*. We will briefly review a couple of them.

In *Zambito v. LIUNA Local 183*, the Applicant had filed an internal complaint which alleged that a co-worker had subjected him to harassing comments about his nationality and family. He was unhappy with the outcome of that process and subsequently filed a complaint with the Tribunal alleging that the respondents violated his rights under the *Human Rights Code* (Code) by failing to take reasonable steps to respond to and address his complaint.

The evidence established that the respondent had interviewed the complainant and the co-worker, and a number of witnesses, some of whom had witnessed the exchange between the employees. The employer concluded that both of them had acted inappropriately and they were given warnings.

Among other things, the Applicant alleged the respondent had not met the third part of the *Laskowska* test. The Vice Chair held as follows:

[38] Finally, I find that the respondents met the third part of the *Laskowska* test. Mr. Varricchio and Mr. Lacroix reasonably resolved the applicant's complaint by meeting individually with him and Mr. Oliveira, and discussing the contents of the investigation report with them. The applicant denies that he received a verbal warning, but acknowledged that he was told that had said things that were not right, and that he had to get along with others. Mr. Varricchio and Mr. Oliveira provided uncontradicted testimony that Mr. Oliveira received a verbal warning. Moreover, the parties agree that the applicant and Mr. Oliveira both returned to work, and there were no issues between them following this meeting.

[39] Even if it is true, as the applicant alleges, that he and Mr. Oliveira were never brought together, Mr. Oliveira never apologized to him, and they never shook hands, the other steps that the respondents took constituted a reasonable resolution of the applicant's complaint. Specifically, the respondents met with him and reviewed the contents of the investigation report with him, and they also met with Mr. Oliveira, reviewed the contents of the investigation report with him, and issued him a verbal warning. These steps are sufficient to constitute a reasonable resolution of the applicant's complaint.

In Gordon v. Best Buy Canada Inc., the Applicant was employed by Premium Retail, and assigned to work as a representative of the Google brand in a Best Buy store in Ottawa. The Applicant had complained that he was subjected to harassment and identified four incidents where comments were made by Best Buy employees. He also asserted he was subjected to harassment and bullying by Best Buy managers which lead to his termination by Premium Brand.

After the four incidents occurred, the Applicant complained to Best Buy with no results, so he complained to his superior at Premium Retail, who escalated the matter to the President of Premium Retail. The President met with the Best Buy Store Manager and the Applicant. They advised him that Best Buy would provide training for the staff regarding respectful workplace conduct, and that the Applicant would no longer have to work with the Best Buy employees.

The Tribunal found that some of the comments that had been made in the workplace did amount to harassment, but were not so egregious or persistent so as to create a poisoned work environment. In addition, there was no evidence that the Applicant's race, ethnic origin or place of origin were a factor in the allegations of bullying and harassment which occurred at the hands of managers.

Best Buy argued that it could not be liable because the Applicant was an employee of Premium Retail. The Tribunal dismissed that argument, and stated:

… to decline to hold a respondent accountable for the discriminatory conduct of an employee because the complainant is an employee of a third party working within the respondent's workplace, would be inconsistent with the broader scheme of the protections offered by the *Code*.

Turning to the issue of whether Best Buy appropriately addressed the complaint, the Tribunal reviewed the test in *Laskowska*. It found that Best Buy failed the second part of the test by not investigating the complaint in a reasonable manner and it identified a number of concerns with the way in which it had dealt with the complaint.

Interestingly, when it reviewed the third part of the test, the Tribunal did find that Best Buy had provided a reasonable resolution following the meeting between the Applicant, the Store Manager and the President: the Applicant was not required to work with either of the two employees against whom he made complaints and the respondent presented evidence that additional training was given to all staff, with an emphasis on training supervisors and managers about workplace harassment. The Tribunal did not agree that the employer had an obligation to remove one of the employees from the Applicant's shift in order to reasonably resolve the complaint. It did not consider the overlap between their shifts, or arrival and departure from their shifts, to be evidence of any unreasonable implementation of the resolution. The Tribunal was satisfied that Best Buy was able to provide the Applicant with a discrimination-free work environment following the meeting.

The Tribunal awarded the Applicant $1500 for injury to dignity, feelings and self-respect as a result of the harassing comments. The cases establish that employers must not only conduct a timely and appropriate investigation, but they must also ensure that they then take steps to provide a reasonable resolution and address outstanding tensions or concerns. There is no cookie-cutter resolution; employers must consider the specific facts and circumstances of each case.

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[1] *Toronto Community Housing Corp. and Toronto Civic Employees' Union, Local 416, CUPE* (Bower), Re 113 C.L.A.S. 119, 228 L.A.C. (4th) 111 at para 254.

[2] *Dodds v. 2008573 Ontario Inc.,* 2007 HRTO 17 (CanLII) at para 44.

[3] *Baisa v. Skills for Change,* 2010 HRTO 1621, 2010 at para 72.

[4] *Hamilton (City) and ATU, Local 107 (B. (A.)), Re,* [2013] O.L.A.A. No. 371, 116 C.L.A.S. 169, 236 L.A.C. (4th) 28

[5] *Supra* note 11 at para 73.