Reaching Out

Looking Ahead to 2024: A Newsletter for Social Services Employers

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Dear Friends,

As we welcome 2024, we are back with another edition of *Reaching Out*. Over the last year, we have seen our social services clients continue to deal with budget challenges and labour shortages. Many are providing permanent and/or hybrid remote work arrangements, where possible, to attract and retain employees. Accordingly, we provide a refresher on key issues to keep in mind with these types of work arrangements.

In addition, the issues employers confronted when they suddenly had to introduce vaccination policies into their workplaces during the pandemic provide an opportunity for us to revisit the principles to consider when introducing any new policy into the workplace.

And, of course, social services agencies strive to be leaders in inclusion in the workplace. In this edition, we discuss two recent decisions of the Human Rights Tribunal of Ontario that may be of interest.

We hope that you find these articles helpful. As always, if you would like more information on any of these articles, or have requests for future editions, please do not hesitate to contact us.

Wishing you all a healthy and rewarding new year.

Michael Smyth, Editor

Guidance for Ongoing Remote Work Arrangements

When the COVID-19 pandemic started, there was little time to consider the legal implications that came with remote work before sending people home to work. Although the pandemic has ended, many employers have maintained remote working arrangements for some employees who are not required to come back to the office or work location to perform their duties.

This article provides a brief overview of issues an employer should consider if it intends to continue to allow employees to work remotely.

Having a Policy in Place

Ideally, an employer should develop a remote work policy that identifies the obligations of both the employee and the employer. A remote work policy should specify that it is a supplement to, and not a replacement for, any terms of employment between employees and the employer. The remote work policy should, among other things, address the following topics.

Hours of Work

When managing remote work, ensure the employee’s scheduled hours of work are specified and the hours worked are recorded. It is useful to address any alternative work schedule (including delayed start and end of shift times for various reasons, including accommodation requests). Identify the process for approval of vacation and overtime hours.

It is also helpful to have in place monitoring mechanisms for tracking the start and the end of the shift. If you do implement these systems, ensure that any mechanisms that are employed to track employees while working from home are captured in your electronic monitoring policy.

Health and Safety

Though the jurisprudence is unclear on whether the *Occupational Health and Safety Act* (*OHSA*) applies to work performed in private residences, it is prudent for employers to take some precautions to ensure the home workspace is safe.

Having employees complete and sign a workstation self-assessment safety checklist can help address safety hazards and address the employer's *OHSA* obligations. In such a checklist, consider making reference to the presence of smoke alarm(s), fire extinguisher(s), first aid supplies, tripping hazards (e.g., extension cords), surge protection, unobstructed exits, lighting (to avoid eye strain) and ergonomic considerations.

If an injury or accident occurs, the employee must immediately report the injury to their supervisor and follow all policies regarding the reporting of injuries for employees injured while at work.

Workers' Compensation

The *Workplace Safety and Insurance Act, 1997* continues to apply to remote workplaces. Employer and employee obligations regarding reporting, premium payments and accommodations continue to be in force.

For employees working remotely outside of Ontario, workplace safety and insurance coverage is automatically in place for up to six months. The employer may apply to the Workplace Safety and Insurance Board to extend coverage beyond six months. Where an employee is working remotely outside of Ontario, employers should also turn their minds to potential registration requirements for workers' compensation in the other province.

Privacy

While working from home, employees must maintain and protect the confidentiality of employer-related information or documentation, whether in electronic or physical form. This must be done at a standard of care consistent with the regular worksite.

Employees should be reminded that the proximity of their cohabitants to sensitive workplace information creates unique privacy risks. These risks extend to telephone and videoconference discussions.

Employer information must be accessed and stored solely on the employer's systems, and the extent of acceptable use (if any) of the employee's personal computer, cell phone or other equipment for employer business should be addressed.

Remote Work Agreement

It is often beneficial to confirm the terms of the remote work agreement in writing. As well as acknowledging the application of the remote work policy, this agreement should confirm the following:

- the intended length or term of the arrangement
- that the arrangement is subject to review and may be revoked at any time by the employer
- that the employee has reviewed the applicable remote work policy
- that, should the remote work arrangement be terminated, all company property will be returned to the employer's premises

Payroll and Tax Implications

Employers must consider the impact of employees working remotely outside of Ontario on payroll deductions and remittances.

In September 2023, the Canada Revenue Agency (CRA) published a new administrative policy that could impact the payroll deductions an employer must make in respect of employees who work fully remotely from a province that differs from the establishment the employee is attached to, based on the indicators identified by the CRA. These changes came into effect on January 1, 2024.

We recently discussed these changes in our *FTR Now* New CRA Administrative Policy Will Affect Payroll Administration for Fully Remote Work Arrangements.

Key Takeaways

There are a variety of legal implications that can flow from ongoing remote work arrangements, and while we have touched on some of them in this article, it is important to seek legal advice if you are considering entering into these arrangements on a more permanent basis. There may be additional implications where the remote work location is outside the province of Ontario.

Vaccination Policies: What Did We Learn?

Most employers have now eliminated the mandatory vaccination requirement for existing employees. However, arbitrators are still being asked to adjudicate on the reasonableness of such policies in the first place. Some have considered whether it was appropriate for employers either to place unvaccinated employees on unpaid leaves of absence or to terminate their employment.

With COVID-19 (hopefully) receding, what are some of the key takeaways for employers to consider when establishing policies such as mandatory vaccination policies?

Not surprisingly, notwithstanding the unprecedented situation the pandemic created, the factors considered by arbitrators are consistent with those that have long been considered by arbitrators when adjudicating on the reasonableness and enforceability of a policy unilaterally introduced by an employer.

The test was first established in a 1965 arbitration decision called *KVP Co. Ltd.* which required that a policy or program unilaterally introduced by an employer must satisfy each of the following:

- The policy must not be inconsistent with the express terms of the collective agreement.
- The policy must not be unreasonable.
- The policy’s terms must be clear and unambiguous.
- The policy must be brought to the attention of the employees.
- The policy must outline any disciplinary or other action that can be taken by management if the policy is not followed.
- The policy must be consistently enforced after its implementation.

Arbitrators tasked with considering union challenges to mandatory vaccination policies applied the factors established in *KVP* and held that a reasonable policy must properly balance an employer’s interest in maintaining employee health and safety and providing services to the general public with an employee’s right to refuse medical treatment. It must also ensure that it complies with the employer’s obligations under the *Human Rights Code* (and the collective agreement) by accommodating anyone who is unable to receive a vaccination due to a protected ground.

While we can all hope that we are not faced with a situation similar to the pandemic again, employers will always be introducing policies of one kind or another into the workplace and it is important to keep the *KVP* principles in mind when doing so.

Discrimination in the Provision of Services

The *Human Rights Code* (*Code*) applies not only to employment situations—it also protects against discrimination in the provision of services, such as those provided by the social services sector.

Service providers should be aware of what constitutes discriminatory behaviour and how seemingly subtle differences in treatment can constitute discrimination that has serious consequences. They must ensure their policies and protocols are designed to be inclusive of all persons, as informal or discretionary processes for interaction with members of the public may lead to significant barriers for racialized people or members of disadvantaged groups.

Service providers must also engage in a reasonable process of accommodation as may be needed, and not simply respond to an issue based on limited information which may be rooted in stereotypes and misperceptions.

Two recent decisions of the Human Rights Tribunal of Ontario (HRTO) underscore these principles.

In *The Estate of Jamaique Rose v. Osaka Japanese Cuisine Ontario Inc.*, the HRTO found that a restaurant discriminated against two customers, who were Black women, by adding a 10% service charge to their meal. Other customers in the restaurant were not charged the additional service charge.

The main issue before the HRTO was whether the women's racial identity was a factor in the adverse differential treatment to which they were subjected. It found that the restaurant provided contradictory explanations for applying the service charge and inferred that it was more likely than not that the service charge was applied in relation to the *Code*-protected characteristics of the two women.

The HRTO made a finding of discrimination in the provision of services the women received. It highlighted that the women's vulnerability as a historically disadvantaged and economically marginalized group could not be overlooked, and the additional service charge was found to be a form of "subtle racism." The two women were each awarded $5,000 in compensation for injury to dignity, feelings and self-respect, among other remedial remedies ordered.

In *H.D. v. Kismutt Small Dog Rescue*, the HRTO found that a dog rescue organization and its owner discriminated against the applicant, a minor living with autism spectrum disorder, in the provision of services.

When the mother of the minor reached out to the organization about a dog available for adoption, the organization's owner informed her that the organization had a firm policy against placing dogs for adoption to families with members on the autism spectrum. The owner also posted on the organization's social media page that rescue dogs should not be placed with families with autistic children, as 99% of those children are violent.

The HRTO found that the owner's views that 99% of autistic children are violent was based on misinformation. It held that the organization failed to engage in any accommodation process in order to determine whether the specific dog in question could be safely placed with the family on the basis of the applicant's disability. Its "actions were a direct and flagrant denial of service on the basis of disability."

The HRTO also concluded that the social media posts of the organization and its owner intentionally incited hatred against families with autistic children, which breached the *Code*. The organization and its owner were ordered to jointly and severally pay the applicant $20,000 in compensation for injury to dignity, feelings and self-respect

Bill 124

And finally, note that the Ontario Court of Appeal has not yet ruled on the government's appeal of the decision that struck down Bill 124 as unconstitutional. Stay tuned for future updates.

If you have any questions about the topics discussed in this edition of *Reaching Out*, please contact your regular Hicks Morley lawyer.

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