Breakfast Seminar Series
Labour Arbitration Update: The Year in Review

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Overview

- What's new with…
  - **Sexual Harassment** – What types of incidents do you need to investigate?
  - **The Duty to Accommodate** – Must an employer agree to the employee's *preferred* treatment plan?

Overview

- What's new with…
  - **Social Media** – Could your organization be liable for harassing comments that *someone else* posts?
  - **Medical Marijuana –** What kind of medical information can you require from an employee before accommodating their medicinal marijuana use?

Sexual Harassment

New and Expanded Definition

- Following Bill 132, the "workplace harassment" definition in the *OHSA* now expressly includes sexual harassment:

> *(a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or*
>
> *(b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome;*

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Changes to Investigation Requirements

- Bill 132 puts a new, positive obligation on Ontario employers to investigate **all** incidents and complaints of workplace harassment

> *[…] an employer shall ensure that […] an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances*

- Including:
  - Anonymous complaints
  - Informal complaints
  - "Second hand" complaints
  - When the complainant is reluctant to investigate

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Changes to Investigation Requirements

- What happens if no investigation? Inadequate investigation?
  - Complaint to MOL
  - Inspector will review facts
  - May order employer to retain investigator
  - Possible charges under the OHSA

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Case in Point: *Innophos Canada Inc. v. United Steelworkers* (2016 – Gray)

What Happened?

- A few days after an offsite teambuilding day, the venue notified the employer it had security footage of one of their employees:
  - Posing naked on a female HR employee's car and later grabbing her hand, kissing it repeatedly, and not letting go until he was "pried" away
  - Touching a female coworker's hips and waist, and slapping her buttocks

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Innophos Canada Inc. v. United Steelworkers (2016 – Gray)

Arbitrator Said…

- Grievor's conduct was sexual harassment – both vexatious and unwelcome
- The venue, though not a "worksite", was still "company premises"
- Just cause for discipline
- Discharge warranted
  - Grievor failed to acknowledge the impact of his actions or express remorse

Lessons Learned

- The definition of "workplace" is broad, and includes social events
- All incidents of harassment **must** be investigated, even if there is no formal complaint by an employee
  - While other employees' failure to report a grievor's conduct may warrant discipline, it does not excuse the grievor's much more serious misconduct
- Whether the employer adequately monitors alcohol consumption or not **does not** change the requirement that employees maintain "appropriate boundaries" in the workplace

The Duty to Accommodate: What's Reasonable?

Legal Framework

- Human rights legislation requires equal treatment and prohibits discrimination in the workplace on the basis of disability
- The duty:
  - Accommodate disabilities to the point of "undue hardship"
- The goal:
  - Enable an employee with functional limitations to be productive in the workplace
- The result:
  - A *reasonable* accommodation; it need not be perfect

Case in Point: *University Health Network v. ONA* (2016 – McNamee)

What Happened?

- Grievor was a nurse with fibromyalgia and related sleep issues
- Requested straight day shifts as accommodation
- Treating psychiatrist said this was the only reasonable accommodation
- Employer disagreed

University Health Network v. ONA (2016 – McNamee)

Arbitrator Said…

- Both fibromyalgia and related sleep disorder were disabilities that required accommodation
- However, straight days was not the only reasonable accommodation
  - The grievor's doctor "crossed the line" and became her advocate
  - While the grievor *preferred* straight days so she did not have to take sleeping pills, she could also function normally on rotating shifts while taking sleeping pills

Lessons Learned

- Employees are expected to cooperate in the accommodation process
  - Includes taking reasonable measures to avoid the need for accommodation in the first place
- Consider whether to accept employee medical information – especially a doctor's script note – at face value
  - Doctors may act as advocates for their patients
  - Consider getting more information, or even a second opinion where appropriate, before accommodating

Employer Liability for Social Media

Employer Liability for Social Media Sites

- It is now well-established that employers can discipline employees for making harassing or inappropriate posts on social media in certain cases
- But, does the employer have a duty to monitor activity on its **own** social media sites?
  - Are those sites a "workplace"?
  - What is the impact of client/member comments on those sites?

Case in Point: *Toronto Transit Commission and ATU* (2016 – Howe)

What Happened?

- TTC maintained @TTChelps – a Twitter account to receive and respond to customer service questions and concerns
- Union grieved abusive tweets posted there by the public, including:
  - Racist and homophobic comments
  - Vulgarity
  - Death threats against TTC employees
- TTC's response: "You can't stop the public from what they say on Twitter"

Toronto Transit Commission and ATU (2016 – Howe)

Arbitrator Said…

- TTC's human rights obligations were triggered even when harassment came from a non-employee third party (e.g., customers, general public)
- Social media sites operated by TTC were part of the "workplace"
- Declined union's request to order TTC to shut down @TTChelps
- Rather, TTC had to take all reasonable and practical measures to protect bargaining unit members from harassment

Lessons Learned

- Monitor vigilantly – employers **can** be liable for the comments of third parties
- Have a clear policy
- Arbitrator suggests:
  - State that the employer does not condone abusive/offensive comments
  - Ask tweeters to immediately delete offensive tweets, or else block them
  - Request assistance from Twitter if needed
  - Consider not having a Twitter account (unlikely!)

Medical Marijuana in the Workplace

Increase in Medical Marijuana Use

- Medical marijuana use is on the rise, in part due to:
  1. 2014 amendments to the *Marihuana for Medical Purposes Regulations* (*MMPR*) under the *Controlled Drugs and Substances Act*
     - No license required; a doctor's note is enough
  2. SCC's decision in *R. v. Smith*
     - Cannabis derivatives no longer prohibited

Accommodating Medical Marijuana Use

- When marijuana is used to medicate a condition that constitutes a disability, the duty to accommodate may be triggered
- Scenario:
  - An employee tells you they need to smoke marijuana every three hours while at work
  - Doctor's note says "Patient prescribed marijuana for pain"

Case in Point: *United Steelworkers v. Mosaic Potash Colonsay ULC* (2016 – Sask LA)

What Happened?

- Grievor had prescription and government authorization to use medical marijuana to treat anxiety disorder and cluster headaches
- When he informed the occupational health nurse, the employer placed him on paid leave
- Grievor only allowed to return to work if he provided evidence he was no longer using a substance that was prohibited by the employer's drug policy
- At hearing, union objected to employer's request for medical evidence

United Steelworkers v. Mosaic Potash Colonsay ULC (2016 – Sask LA)

Arbitrator Said…

- Employer entitled to medical documents re: grievor's current and proposed treatment plan so it could determine whether:
  - Medical marijuana was an appropriate treatment
  - A more appropriate treatment was available
  - Employee under influence of marijuana fit to work in a safety-sensitive position

Lessons Learned

- A prescription is the starting point, not the end of the inquiry
- Seek out more information to confirm:
  - Requirement to use marijuana
  - Amount and frequency of use
  - Duration of prescription
  - ***Level and type of impairment
- Consider: is a complete absence of impairment a BFOR?

Coming Soon(?)

Issues to Watch

- Changing Workplace Review of the *Labour Relations Act* and the *Employment Standards Act, 2000*
- Proactive federal pay equity regime?
- Formal flexible work arrangements under the *Canada Labour Code*?

Questions?