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Employment and Labour Law Update

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Refusal To Mask: Human Rights Tribunal Rejects Creed-Based Request for Accommodation and Addresses Disability

Connie Cheung
416.217.2232
ccheung@sherrardkuzz.com

In the ongoing effort to limit the spread of COVID-19, many municipalities have enacted a by-law requiring mask wearing in a variety of public places. In a recent decision[1], the Human Rights Tribunal of Ontario ("Tribunal"), dismissed an application in which an applicant argued he could not wear a mask due to his creed and disability.

What happened?

The City of Toronto ("City") passed a by-law requiring the wearing of masks in certain public places. Rishi Sharma claimed he was denied service by several businesses in the City because he refused to wear a mask. He claimed he could not wear a mask for two reasons:

(i) Creed: His creed required that that he "*not blindly accept what government or agencies claim, mandate or enact into laws (or by-laws). Instead it [was his] civic duty to be critical of government and their decisions*"; and

(ii) Disability: Wearing a mask impaired his breathing and bodily functions.

Sharma argued this denial of service was a violation of the *Human Rights Code* (Ontario)[2] ("*Code*") and brought an application against the City.

The Tribunal held a summary hearing to determine whether the application should be dismissed on the basis there was no reasonable prospect it would succeed. In a summary hearing, the Tribunal does not determine whether the facts are true or assess the treatment an applicant alleges to have experienced. In most cases when an application is dismissed at a summary hearing, it is because the applicant is unable to show a connection between the alleged adverse treatment and a *Code*-protected ground. In other cases, an application may be dismissed because an incorrect party is named as the respondent.

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The Tribunal dismissed Sharma's application because it had been brought against the incorrect respondent - the City - but there were no facts to suggest the City itself had breached the *Code*. The conduct complained of was that certain businesses operating in the City failed to accommodate Sharma. Sharma argued it was unreasonable to require him to bring an application against each of the businesses, as there were several, and in any event they were behaving in compliance with the City's by-law which Sharma argued was not sufficiently clear. Hence, he said, the City should be held responsible. The Tribunal rejected this argument:

> I find that there is no alleged discriminatory action by the City itself. I do not accept that the By-Law is unclear. To the contrary, the By-Law specifically requires a business' policy to contain exemptions for those with underlying medical conditions or otherwise requiring accommodation under the *Code*. The By-Law further says that such a policy must *not* require a person claiming an exemption to provide proof. In the circumstances, the City cannot be faulted for the alleged conduct of businesses who may be incorrectly applying the By-Law…
>
> Simply put, I find that the alleged conduct of those businesses that the applicant says have denied him services cannot be laid at the City's feet. The Application against the City has no reasonable prospect of success because the applicant has not alleged adverse treatment by the City, as opposed to by the various businesses.

"Obiter" Comments About Creed and Disability

In reaching its decision, the Tribunal commented about "creed" and "disability" under the *Code*. Those comments, while "obiter" (incidental and not essential to the decision or establishing a binding precedent) are nevertheless noteworthy.

The Tribunal rejected Sharma's creed-based argument on the basis his belief was more political than religious. "Creed", said the Tribunal, while not defined in the *Code*, "*most often engages an applicant's sincerely held religious beliefs or practices… However, mere political opinion does not engage creed...*". The Tribunal suggested the appropriate recourse was to raise these concerns with the City's elected officials rather than file an application before the Tribunal.

Regarding Sharma's claim of a disability, the Tribunal found this plausible given the broad definition of disability under the *Code*. However, as this was a summary hearing, the Tribunal was not asked to, nor did it, make any factual finding about whether Sharma had a disability, or whether he was discriminated on the basis of it.

In summary, the Tribunal made the following important comments about disability:

- Accommodation is a shared responsibility.
- In order to engage the duty to accommodate, an individual must identify a disability-related need that requires accommodation. This means, if questioned, an individual must advise a business they have a medical condition or other reason trigging accommodation.
- The City's by-law, and human rights law generally, do not require an individual to disclose the specific disability or provide proof of same.
- Once the fact of a disability is disclosed, a business may not simply turn away the individual and refuse to serve them; the individual ought to be accommodated to permit access to the service.
- The duty to accommodate is not infinite, but rather ends at the point of undue hardship.

Best Practices for Employers...

While a business has a duty to accommodate a customer who cannot wear a mask, this does not mean the business must permit the customer entry without a mask. A business can fulfill its duty to accommodate by offering the service through other appropriate means (*e.g.,* curbside pickup, delivery, attendance at the store outside regular business hours, *etc.*).

It is also important to keep in mind that the general rule against requiring proof of an underlying disability from a customer does not apply to an employee. An employer is permitted to request medical documentation sufficient to substantiate an employee's alleged disability and restrictions to enable the employer to consider accommodation. If no accommodation is reasonable in the workplace for health and safety reasons, a leave of absence or work-from-home arrangement may be an appropriate option.

Finally, while it may be a good practice to look for accommodation with which all parties are happy, if an employee or customer refuses an offer of *reasonable* accommodation, the business/employer has discharged its duty to accommodate, and there is no legal obligation to do more. What is *reasonable* is fact specific and will depend on the circumstances.

To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer or, if you are not yet our client, any member of our team.

[1]*Sharma v Toronto (City),* 2020 HRTO 949 (Connell)

[2]RSO 1990, c. H. 19

DID YOU KNOW?

An employee not permitted in the workplace by their employer until they have been vaccinated against COVID-19 is eligible to treat the time off work as Infectious Disease Emergency Leave under the *Employment Standards Act, 2000* (Ontario).

Natalie Fisher
416.603.6770
nfisher@sherrardkuzz.com

Breach of COVID-19 Protocols Cause for Termination

As many of you know, an employer is required to take every precaution reasonable in the circumstances for the protection of its workers. In the fight against COVID-19, an employer's ability to satisfy this obligation inescapably relies on the honesty and cooperation of its workers. A worker's failure to comply with COVID-19 protocols can have significant consequences in the workplace and beyond.

Two recent arbitration decisions confirm a worker's failure to comply with COVID-19 protocols may amount to just cause for termination.

What happened?

In ***Garda Security***,[1] Arbitrator Brian Keller upheld the termination of a unionized security guard who attended work at Toronto Pearson Airport after a COVID-19 test but prior to receiving the result. Six days after her test, she informed the employer she had tested positive for COVID-19.

The grievor claimed she chose to work because she did not feel sick. Despite both parties agreeing the employer had informed all workers of the requirement to isolate while awaiting a COVID-19 test result, the grievor denied being aware of it.

Arbitrator Keller concluded the grievor was aware of the of the requirement to isolate. The employer's COVID-19 guidelines were unambiguous and brought to the attention of all workers. Although the incident occurred relatively early in the pandemic – April 6, 2020 – Arbitrator Keller found it difficult to believe the grievor (or anyone) was unaware of the relevant public health guidelines at the time.

Arbitrator Keller held that by going to work, the grievor put her co-workers and the general public at risk of illness or death. The grievor showed no remorse for her actions nor concern for the potential consequences to countless others. Accordingly, the grievance was dismissed.

In ***Aecon Industrial***,[2] Arbitrator Joseph Carrier upheld the termination of a worker who reported to work despite exhibiting symptoms of COVID-19 and being instructed to remain home until cleared to return.

The grievor, a 64-year-old labourer with five years' service, worked at the Darlington Nuclear Generating Station, a highly safety-sensitive work environment. He had previously been disciplined for safety-related infractions.

On April 9, 2020, the grievor called his foreman before his scheduled shift to advise he was feeling ill with COVID-19 symptoms. The foreman told the grievor not to attend work until he was contacted by the company nurse. The grievor called the employer twice that day and was told both times not come to work until expressly allowed.

Despite this instruction, the grievor reported to work on April 14, his next scheduled shift, and answered "no" to all the questions on the employer's COVID-19 screening questionnaire. When the foreman confronted the grievor during the morning meeting, the grievor confirmed he had not been cleared to return to work and had a runny nose which he attributed to seasonal allergies.

The grievor argued he believed his failure to show up for work would be more perilous to his job than his failure to stay home, having not heard from the employer for several days. In a strong rebuke, Arbitrator Carrier held the grievor's decision to attend work was a deliberate attempt to circumvent his employer's instructions and put his personal interests ahead of the risks he knew he presented to others. He also took issue with the grievor's failure to report having a runny nose and alert the screener he had been told to stay home due to his COVID-19 symptom.

Arbitrator Carrier held, *the Grievor's deliberate and cavalier attitude toward the COVID safety risks he represented both to his co-workers and in turn to the Company's obligations to protect the workplace was unconscionable, unreasonable and totally unacceptable."* Taking into consideration the grievor's earlier safety infractions, Arbitrator Carrier held the grievor could not be trusted to avoid unsafe conduct in the future; the decision to terminate was therefore upheld.

Lessons for employers

While each case will be decided on its facts, these two decisions offer the following lessons for employers:

- Have appropriate COVID-19 protocols in place and directly bring them to the attention of all workers and others in the workplace. Although it will be difficult for a worker to claim ignorance of COVID-19 public health guidelines (given their notoriety), it is best to not take this for granted.
- A violation of employer or public health COVID-19 guidelines is likely to be viewed as a serious offence deserving of discipline up to and including termination for cause. An adjudicator will not look kindly on a worker who places their personal interests above the health and safety of co-workers and others.
- Even if a worker does not have COVID-19, a breach of protocol may nevertheless be considered serious if it has the potential to spread the virus to a wide number of people or vulnerable population.
- To support compliance with COVID-19 protocols, an employer should consider allowing a worker time off work to get tested, and ensure every worker is aware of benefits to which they may be entitled if they are required to isolate for COVID-19 related reasons.[3]

We expect to see more decisions like these in the coming months.

To learn more and for assistance, contact a member of the Sherrard Kuzz LLP team.

[1] *Garda Security Screening Inc v IAM, District 140 (Shoker Grievance)*, [2020] OLAA No 162 (Keller)

[2] *Labourers' International Union Of North America, Ontario Provincial District Council And Labourers' International Union of North America, Local 183 v Aecon Industrial (Aecon Construction Group Inc.)*, 2020 CanLII 91950 (ON LA) (Carrier)

[3] This is a legal requirement in some jurisdictions, including in the City of Toronto. To learn more, see this Sherrard Kuzz LLP Briefing Note.

MANAGEMENT COUNSEL

HReview Seminar Series

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PRIVACY LAW

New and emerging issues

With amendments to Federal privacy legislation on the horizon and COVID-19-related issues continuing to percolate, workplace privacy and confidentiality have emerged as hot topics in 2021. Join us as we discuss:

1. Legislative Update

- Bill C-11 (the *Digital Charter Implementation Act*) and how it may impact your workplace.
- Is private-sector privacy legislation coming to Ontario (similar to some other provinces)?

2. Hiring, Firing and Surveillance

- Privacy and the hiring process.
- Employee breach of privacy or confidentiality – when is this just cause for termination?
- Surveillance (inside and outside of the workplace) – when is it permissible?
- The tort of "intrusion upon seclusion" – how has it been applied to the workplace; how might that change in the future?

3. COVID-19

- Screening, test results and vaccination status – what is an employer entitled to know?
- When is it permissible to disclose COVID-19-related personal and/or medical information (*e.g.,* to a co-worker, client, medical officer, *etc.*); how to safeguard this information.

4. Workplace Privacy Policy – an Employer's Best Friend

- Why every organization should have a privacy policy.
- Key components of an effective and compliant policy.

DATE: **June 9, 2021; 9:00 a.m. – 10:30 a.m.**
WEBINAR: **Via Zoom** (registrants will receive a link the day before the webinar)
COST: Complimentary
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SHERRARD KUZZ LLP
Employment & Labour Lawyers

250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 HOUR 416.420.0738
www.sherrardkuzz.com
@SherrardKuzz