

# Dear Boss: Can I Work Remotely From Hawaii? Labour, Employment & Human Rights Bulletin



As a result of COVID-19, many Canadian provinces declared a public health emergency and either ordered (or recommended), that Canadian employers allow employees to work from home if their tasks could be performed remotely. A business may be faced with several crucially important issues with regard to performing work remotely. Can an employer establish an area or a distance within which employees are required to perform their duties remotely? Is it reasonable for an employer to prevent its staff from performing their work outside of Canada, when teleworking is presently mandatory in many Canadian provinces?

In a recent Quebec decision, an arbitrator had to decide on the strict and automatic application of a policy prohibiting an employee from performing their work duties from abroad.<sup>1</sup>

## Background

The employee, an associate professor at a Quebec university, requested the employer's permission to stay in Honolulu, Hawaii to perform his work duties remotely, following a year's sabbatical during which he had moved to Honolulu with his family. Due to the pandemic-related public health emergency in Canada and a prior health issue affecting one of his children, the professor and his family wished to stay in Honolulu due to the low per capita COVID-19 infection rate.

The employer refused the employee's request and he therefore returned, without his family, to Quebec, where he performed all of his tasks from his residence without ever having to report to his place of work.

He then submitted a second request for permission to perform his work duties from Honolulu so that he could join his family. The employer again refused, to avoid creating a precedent that could trigger numerous requests to work remotely outside of Canada, thereby creating what it considered an administrative burden. In particular, the employer refused to allow the employee to work from abroad for the following reasons:

- the employer's group insurance would not cover the employee while working remotely from abroad;

- the employee could encounter problems with provincial and federal health insurance coverage (for example, he might no longer be eligible to RAMQ), if he performs his work remotely;
- an employee generally has to pay income tax in the country where he is staying, which would create significant administrative challenges for the payroll department and potential problems with federal and provincial tax authorities;
- given that a business is responsible for providing all employees with safe and ergonomic working conditions, this responsibility would be impossible to ensure from abroad;
- performing the work could prove to be difficult due to the five-hour time zone difference between Hawaii and Quebec.

The union argued that the employer had to, in reasonably exercising its right to manage the workplace, take into account the special circumstances of the employee's request, so as to avoid a systematic and strict application of its teleworking policy, which would constitute exercising a management right in an unreasonable manner.

### **In these circumstances, could the employer refuse a teleworking arrangement from Honolulu'**

The arbitrator was of the opinion that the working conditions and the administrative paperwork of several employees working from abroad could be a burden to an employer. Accordingly, it could *prima facie* constitute sufficient grounds to justify a general prohibition against working abroad. The employer could indeed create a dangerous precedent if it agreed to a request based only on the desire to spend time abroad.

However, the employer had to accept the employee's request to work from Hawaii in the context where:

- teleworking was mandatory for the employer due to the regulations of public authorities (and, as such, was not a privilege);
- the employee was not required to be physically present in Canada to perform his work duties during the period for which the employee had requested to work from Honolulu; and
- the health of one of the employee's children was the basis for the request.

The employee had also shown that the time zone difference would not affect the quality of his work, because he would adjust to local time in Quebec. Moreover, he had taken out private insurance and had obtained the RAMQ's confirmation that his coverage would be valid even if he was working from Honolulu. His accountant had also confirmed that there would be no tax implications relating to his salary and the applicable deductions, because his principal residence would still be in Canada. The employer's reasons for refusing the request were therefore unfounded.

### **Takeaways'**

The employer may generally, under its right to manage the workplace, decide the location where telework is to be performed. However, this does not prevent it from assessing special circumstances making reasonable exceptions. As such, the automatic application of a teleworking policy, without considering exceptional

circumstances that could justify an exemption or the easing of certain restrictions, should be avoided.

As long as teleworking continues to be mandatory due to COVID-19 (and that, as such, it is not merely a privilege granted to an employee by a business) and that the request of an employee who wishes to work remotely from another country is founded on **serious** and **exceptional** circumstances, such as the health of a member of the employee's family, legal advice should be sought before automatically refusing such a request. An employer could be justified in refusing telework from another country if it is able to show that the employee's ability to perform the work would be affected, the employee's physical presence is required during the relevant period, or other material issues are raised for the employer.

Remote work – particularly from another jurisdiction – raises a number of complicated employment, tax and other issues for employers. If you need advice about remote work, please contact the author or your regular Fasken lawyer.

## Footnotes

<sup>1</sup> *Syndicat des professeurs et professeures de l'Université Laval (SPUL) and Université Laval*, January 28, 2021.

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