



# FTR QUARTERLY

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#### IN MEMORIAM

## **ROBERT HICKS** Q.C., B.A., LL.B. 1917-2013

It is with great sorrow that we note the passing of our retired founding partner and friend, Robert (Bob) Hicks.

As Canada's first full-time management labour lawyer, Bob was a pioneer in the development of the practice of labour law, and a trusted advisor who always put the clients' interests first. Bob's leadership led to the founding of Hicks Morley in 1972 – leadership he provided throughout his career, and in all that he did. Bob was the firm's first Managing Partner, and in addition to his numerous corporate and philanthropic directorships, he advised Prime Ministers and Premiers alike. He will be remembered for his excellent judgment and his fair and honest principles. His legacy lives on in all the work we do at Hicks Morley.



## BALANCING INTERESTS – LEGAL CHALLENGES IN THE SOCIAL SERVICES SECTOR

The social services sector has a mandate like no other – supporting and protecting the most vulnerable members of society. From children’s aid societies, to community living organizations, to women’s shelters, these employers play a vital role in providing ongoing help to their clients in times of need.

But like any employer, these organizations have their own unique human resources issues – and that’s where the experience of Hicks Morley’s Social Services Group plays an important supporting role.

“It can require a different type of problem-solving because the non-profit mandates of the agencies – generally to help the most vulnerable members of the public – are different than those of other organizations,” says David Ross, an associate in the firm’s Toronto office.

“Our client contacts are very caring people who genuinely want to help their employees and avoid conflict if possible. And they are typically working with employees who place a strong emphasis on fairness, whether related to overtime distribution, job postings, or call-ins for shifts. So the legal solutions have to be consistent with the culture, missions and principles of the organization and its employees.”

## THE AGE OF FISCAL RESTRAINT

These principles have been tested in recent years, with virtually all agencies under increasing pressure – whether through legislation or through direction from funders – to demonstrate significant fiscal restraint.

“The issue is that when cost-containment strategies are poorly negotiated and implemented, it can lead to grievances, labour board applications and lawsuits,” says Daniel Fogel, a Toronto office partner and Chair of the Social Services Group.

“It means that money saved at the table is eaten up in other ways – so it’s more important than ever to take a ‘big picture’ approach to fiscal restraint. That means pursuing financial objectives firmly but rationally, and in a manner that doesn’t jeopardize the union-management relationship our clients will be returning to when the bargaining is done.”

Another trend that has emerged out of the need for greater efficiencies is an increase in mergers and amalgamations. This can range from the wholesale amalgamation of agencies to shared services arrangements amongst participating agencies.

“These events all have employment and labour relations implications that have to be carefully assessed and planned for to minimize any negative consequence for the agency and its employees,” says Vincent Panetta, a partner in Hicks Morley’s Kingston office.

“I was recently involved in two large agency amalgamations – and the subsequent negotiations of a new collective agreement. It’s complex work but our preparations for negotiation – and the client’s hard work in forging a constructive relationship with the new bargaining agent – paid off in a favourable settlement.”

## HUMAN RESOURCES CONCERNS

While bargaining issues are often front and centre, legal issues in this sector reach far beyond the negotiating table.

“I’ve seen a heightened awareness of neglect and abuse-related issues, particularly in long-term care, community living and other residential services for the developmentally disabled,” says Sophia Duguay, a partner in the firm’s Kingston office.

“It’s challenging – our clients strive to promote and enforce zero tolerance of neglect and abuse, but they have to manage mounting (and sometimes competing) legal and public relations issues, including regulatory compliance, police investigations and possible criminal charges, all of which raise a range of human resources issues. These are key areas in which we can help.”

Our client contacts are very caring people who genuinely want to help their employees and avoid conflict if possible.

The high demands on employees in the sector can bring another key issue to the fore – absenteeism.

“We continue to see attendance management issues in the sector – likely due to the demands that come with working in this field,” says Leanne Fisher, an associate in the Hicks Morley Ottawa office.

“There’s a high cost to absenteeism that clients really can’t afford in this day and age, so having good attendance management programs in place is essential. We provide a lot of advice and support to our clients to help them achieve this.”

## SHARED KNOWLEDGE, SUPERIOR SERVICE

Social services is a unique area that requires an approach to legal HR issues based on specific knowledge and experience in the sector. That gives Hicks Morley lawyers a huge advantage in advising and advocating for its clients.

“We created the Social Services Group to coordinate our approach and share our experiences and solutions in this sector,” says Stephen Goodwin, a partner in the firm’s Waterloo office. “Our size and depth ensures we don’t reinvent the wheel when a situation comes up – it’s the rare issue that several of us have not already thought about. We also have extensive experience in the broader public sector, and this ‘macro provincial’ knowledge gives us a context and insights that others simply don’t have.”

In the end, the firm’s role is to help social services organizations effectively manage their legal challenges, and place their focus on those who need it most: the clients they serve so well.



## THE CHANGING STATUS OF FAMILY STATUS

Employers have long been aware that both federal and provincial human rights legislation protects against discrimination on the basis of family status. So far, case law on accommodation of family status issues has focused on the extent to which employers must accommodate employees' childcare responsibilities. However, with baby boomers entering retirement, employers can expect to see the issue of eldercare come to the forefront of accommodation issues.

BY: GEORGE G. VUICIC AND JULIA M. NANOS

In 2012 and 2013, the Human Rights Tribunal of Ontario ("HRTO") and the Canadian Human Rights Tribunal released two significant decisions on the issue of eldercare. These decisions extend family status protection to employees' eldercare responsibilities. They also clarify the test that is to apply in all family status accommodation cases.

### FAMILY STATUS DISCRIMINATION

In our Winter 2011 edition of *FTR Quarterly*, we reported on two different "tests" for family status discrimination.

The first test came from the 2004 case *Health Sciences Assn. of British Columbia v. Campbell River and North Island Transition Society* ("Campbell River"). To establish discrimination, the *Campbell River* test

required that employees show: (a) an employer-initiated change in terms or conditions of employment; and (b) that the change resulted in a “serious interference” with a “substantial” parental obligation.

The second test is much broader. In *Johnstone v. Canada (Border Services Agency)* and *Seeley v. CNR*, the Canadian Human Rights Tribunal held that the *Campbell River* test was inappropriate because it created a higher threshold for family status discrimination than for other prohibited grounds. In other words, “ordinary” work/childcare conflicts *may* attract the duty to accommodate. Both *Johnstone* and *Seeley* were upheld on judicial review in 2013.

## ELDERCARE REQUIREMENTS

The first decision regarding eldercare is that of the HRTO in *Devaney v. ZRV Holdings Ltd. et al.* (“*Devaney*”). Devaney was an architect at ZRV for approximately 27 years when his employment was terminated for absenteeism. Some two years prior to his dismissal, Devaney began to work from home to care for his mother, for whom he was primary caregiver. After managing Devaney’s absenteeism for some time, ZRV insisted that he be in the office during business hours – a job requirement set out in the office manual. When Devaney’s absenteeism continued, his employment was terminated.

The HRTO made several key determinations. First, the HRTO accepted that Devaney’s mother was properly a part of his family within the meaning of the *Human Rights Code*. In determining whether Devaney had established discrimination, the HRTO rejected the *Campbell River* test. Instead, it found that Devaney was only required to establish that ZRV’s attendance

requirements adversely impacted him because his absences were *required* due to his status as primary caregiver. In sum, the HRTO found that family caregiving responsibilities need not be “substantial” in order to attract protection. They must, however, be *required*. In this case, ZRV’s attendance requirements adversely impacted Devaney as his eldercare responsibilities required that he be absent on numerous occasions.

## NO CONFLICT REQUIRED

In September 2013, the Canadian Human Rights Tribunal released *Hicks v. HRSDC* (“*Hicks*”). This decision is noteworthy because the Tribunal accepted Hicks’ mother-in-law as “family” and recognized that family status protection is available even if there is no conflict between an employee’s work and family obligations.

HRSDC relocated Hicks from Nova Scotia to Ottawa for work. Hicks took up residence in Ottawa. His spouse remained in the family home in Nova Scotia to care for her mother, who lived in a nearby nursing home. Hicks made a claim for Temporary Dual Residence Assistance (“TDRA”), which would have provided temporary financial assistance to offset costs associated with maintaining dual residences. However, the TDRA was only available if one of the residences was occupied by a “dependant” who had been living with the employee prior to relocation. Hicks failed to qualify under these rules and his claim was denied.

The Tribunal found that the TDRA eligibility rules created a distinction between dependants residing in and outside the home. Although Hicks suffered no work/family conflict, this distinction precluded Hicks from accessing the TDRA because of his family characteristics. Given that the



HRSDC failed to establish a legitimate work-related purpose for the distinction or that accommodating Hicks would have caused undue hardship, the Tribunal found that Hicks had in fact been discriminated against.

### THE IMPORTANCE OF PROCEDURE

Courts and other tribunals have long emphasized that an employer's duty to accommodate includes both a procedural and a substantive aspect. *Hicks* and *Devaney* serve as a reminder to employers of the importance of their procedural obligations under human rights legislation.

In both cases, damages were awarded for the employers' failure to follow a proper procedure in response to a request for accommodation. In *Devaney*, the HRTO found that ZRV failed to engage in meaningful dialogue with Devaney about his needs, relying instead on its strict attendance policy. In *Hicks*, the Canadian Human Rights Tribunal awarded \$20,000 in additional damages, finding that HRSDC

showed "disregard and disinterest" in Hicks' family status by relying on its strict eligibility rules. These conclusions are similar to the findings of the Federal Court of Canada in *Johnstone* and *Seeley*, where that Court was critical of the employers' refusal to discuss – or even consider – the employees' requests for accommodation based on family care obligations.

Once an employee has requested accommodation based on family care needs, employers must make appropriate inquiries to obtain sufficient information, and must also engage in meaningful discussion with the employee *before* determining whether the duty to accommodate applies and, if so, what accommodation measures might be appropriate. In a recent *FTR Now*, we provided a checklist of topics for employers to discuss with employees requesting childcare accommodation. This checklist, accessible at <http://tinyurl.com/hmchecklist>, is equally useful for discussions regarding eldercare.



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# WORKPLACE INVESTIGATIONS: AVOIDING COMMON PITFALLS

Human resources professionals are increasingly being required to investigate complex workplace disputes and concerns. Be it an instance of workplace violence, harassment, discrimination or theft, it often falls on human resources professionals to conduct a thorough investigation of the alleged event and determine the appropriate organizational response.

BY: ANDREW N. ZABROVSKY

The importance of conducting effective workplace investigations has only been heightened with the 2010 amendments to the *Occupational Health and Safety Act*. With workplace violence and workplace harassment complaints becoming far more common, the expectations placed on human resources professionals to conduct thorough, fair and expeditious investigations are greater than ever before. Keeping this in mind, here are ten key tips that a human resources professional should keep in mind when performing a workplace investigation.

## 1. TREAT ALL COMPLAINTS SERIOUSLY

Sometimes a complaint may land on your desk and on its face, it doesn't appear to amount to harassment, discrimination or some other form of misconduct. Be careful not to draw preconceived notions about the validity of a complaint solely

from how an employee has initially recorded it on paper. All allegations of misconduct should be treated seriously and investigated to the extent necessary to determine whether misconduct actually occurred. While some allegations may not seem to be worth the expenditure of time and resources required for a thorough investigation, the time and resources that may be saved by avoiding a future court or tribunal proceeding will often be worth it.

## **2. ALWAYS REFER TO YOUR POLICIES AND PROCEDURES BEFORE COMMENCING AN INVESTIGATION**

Your organization's policies and procedures may set out a clear process that must be followed in the case of a particular type of allegation. In any investigation, it is just as important to make sure you follow any required procedures as it is that you come to a reasoned conclusion. Policies exist to ensure that all parties to a complaint participate in a fair investigation process; failing to follow established policy is among the most serious mistakes an investigator can make.

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## **3. ENSURE YOU CAN CONDUCT A FAIR INVESTIGATION BEFORE YOU START**

Sometimes you may be too close to the issue being investigated, or to one of the parties involved. If there is any question in your own mind as to whether you can preserve the fairness of the investigation process (or where it may appear to be unfair because of your involvement), you should seek out the services of an investigator from outside the organization.

## **4. ONLY INVESTIGATE WHAT YOU ARE ASKED TO INVESTIGATE**

Often while investigating specific allegations, other unrelated performance or conduct concerns may arise with respect to the parties involved. While these other issues may merit further inquiry, do not allow them to sidetrack or overwhelm your investigation. Allowing these other issues to creep into an investigation is an easy way to shift focus and undermine your efforts.

## 5. CREATE AN INVESTIGATION PLAN

Before starting any investigation, prepare a formal plan of how you intend to investigate the matter. This will include turning your mind to who you should interview, what documents you may need to obtain and what specific issues you will have to look into. Having a plan in place before you begin an investigation will help you maintain focus and perform an expeditious investigation.

Confidentiality is not something you can promise during an investigation, and you should make this clear to all witnesses when you meet with them.

## 6. COMMUNICATE WITH YOUR WITNESSES

Taking part in an investigation is not a normal part of your employees' everyday duties. It can often be a nerve-wracking process. This is a feeling you can help to mitigate by communicating openly with your witnesses about the process you will be undertaking, their role in it and what they can expect as the investigation proceeds.

## 7. DON'T PROMISE CONFIDENTIALITY

Witnesses may only want to speak with you if you can keep what they say "confidential." At times during an investigation you will have to share information gained from one witness with others in order to corroborate a story or clarify an inconsistency. Confidentiality is not something you can promise during an investigation, and you should make this clear to all witnesses when you meet with them.

## 8. GET THE WITNESS TO TELL HIS OR HER STORY

Inexperienced investigators will often ask closed-ended questions based on what they already know about an incident, seeking corroboration from the witness. This form of questioning only reinforces any latent preconceptions you may have about the alleged incident, and does not allow the witness to tell his or her story. Make sure you are asking witnesses open-ended questions that allow them to provide you with their view of the incident. This will help you determine what actually happened.

## 9. WATCH BEHAVIOUR AND BODY LANGUAGE

Sometimes the important information in an interview can be found not in what is being said, but in *how* it is being said. Make sure you watch a witness' body language and mannerisms; they may shed light on the witness' truthfulness and credibility. Beware, however, in making your decisions based solely on body language – for example, just because a witness appears nervous doesn't mean he or she is untruthful. Being a witness isn't normally a comfortable experience.

## 10. WHERE YOU'VE BEEN ASKED TO MAKE A DETERMINATION, DO SO

Inexperienced investigators will often decide not to come to a final determination on an issue, claiming that it was a “he said-she said” situation. Even where all you have to go on is the evidence of the complainant and the respondent, you still need to decide whether it is more than likely that the allegations raised are true. Even in a true “he said-she said” situation, you will still have to make a decision.



*Andrew Zabrovsky is an associate lawyer in Hicks Morley's Toronto office whose practice is focused on working with public and private sector employers on labour relations and human rights matters. Andrew has acted as counsel to employers before the Human Rights Tribunal of Ontario and presented at numerous client and industry group conferences on a range of topics, including workplace investigations.*

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HR QUICK HITS

## Implementation of Federal Budget 2013 initiatives

With the recent coming into force of Bill C-4, *Economic Action Plan 2013 Act, No. 2*, the federal government implemented the following initiatives, among other matters:

- the Department of Human Resources and Skills Development Canada (commonly known as “HRSDC”) has been renamed the Department of Employment and Social Development Canada (“ESDC”); and
- effective December 31, 2013, *Regulations Amending the Immigration and Refugee Protection Regulations* implement a new compliance verification and enforcement regime for the Temporary Foreign Worker program, including enhanced Citizenship and Immigration Canada and ESDC powers to verify employer compliance with the program requirements.

For more information, visit our blog at [www.humanresourceslegislativeupdate.com](http://www.humanresourceslegislativeupdate.com)

## CLASS ACT



Lauri Reesor has been a lawyer in Hicks Morley's Toronto office for her entire legal career, becoming a firm partner in 2012.

In addition to her labour arbitration practice – and her tribunal work in areas such as human rights and pay equity – Lauri acts for employers in class action litigation, bringing significant expertise and experience to the firm's work in this growing area.

We spoke to Lauri about the evolution of her practice and some of the emerging issues that employers are facing.

### **Where are you from, originally?**

My father was with the OPP, so we moved a bit. I was born in Orillia, and lived in Oshawa for a while, but consider the Barrie and Orillia area my "home." I went to high school in Barrie and my family still lives in the Barrie and Muskoka area.

### **How did your interest in law develop?**

Other than a brief period in kindergarten when I wanted to follow my grandfather's footsteps into farming, I always wanted to be a lawyer. I grew up in a policing family and I was very interested in criminal law. And that's what I thought I would do – become a Crown attorney.

So after getting a degree in anthropology, I continued on at Western into law school. After doing some criminal defence work with the student legal aid clinic, I realized that criminal law was not a subject matter that I wanted to practise day after day. We had a fantastic labour law professor at Western, and in fact, two of my now partners also taught an arbitration course at Western. It was the people-based focus of the area of law that really drew me to the labour and employment field, combined with the advocacy work that I wanted to pursue. Labour and employment law is constantly evolving, which keeps it fresh and interesting.

### **What brought you to Hicks Morley?**

I made an early decision to target Hicks Morley as the recognized leader in management-side human resources law. I made sure to get out to a Hicks Morley arbitration while still in law school and competed in the Hicks Morley Moot. I was fortunate to be accepted for an articling position in 2002. Eleven years later and I'm still here!

It was the people-based focus of the area of law that really drew me to the labour and employment field, combined with the advocacy work that I wanted to pursue.

### **Has your practice changed much over the years?**

I've always enjoyed the variety – and I've tried to keep it that way. On the labour side, arbitrations have always kept me busy, but I've also developed expertise in human rights litigation and pay equity.

The shift for me on the litigation side has been an increasing focus on class action litigation. I actually started working on a retiree benefit class action file as an articling student, and returned to work on the file as a lawyer. And I've continued my class action work ever since. It's an interesting area that can cover a range of issues, from retiree benefits, to overtime eligibility and unpaid wage claims, to environmental health and safety.

### Any emerging challenges for clients from an HR law perspective?

One of the challenges that impacts almost every client – especially in the public sector – is having to do more with less. The legal issues are as pressing as ever, but the resources to deal with them are often stretched. This means providing creative practical advice that balances the business and legal interests of the client.

One of the challenges that impacts almost every client – especially in the public sector – is having to do more with less.

Another challenge is keeping on top of “sleeping dog” issues such as pay equity. While many employers achieved pay equity in the 1990s, it has to be maintained over time. With no limitation period, the potential exposure is quite significant. The Pay Equity Commission is actively auditing employers, especially in the private sector.

### Any legal trends of note?

I think there are trends in a few areas – and family status accommodation is a good example. Two recent Federal Court decisions changed the legal landscape and childcare and eldercare accommodation issues are on the rise. We’re also seeing more accommodation cases involving psychological disabilities, such as anxiety and stress and service-based accommodation complaints.

Data breaches and the potential risk for class action litigation is another potential trend to watch. Employers need to minimize their litigation risks by having policies in place to deal with data handling – and a process to deal with any data loss.

### How about your life outside of law – what are your main interests?

I live in Oakville with my wonderful and very active seven-year-old son, so when I’m not in the office I’m usually running to Beavers, swim lessons, or Tae Kwon Do classes. We really enjoy outdoor activities together too, like skiing and camping. For myself, I took up boxing a few years ago, a great stress reliever when you put on those gloves!





## PROFESSIONAL DEVELOPMENT SESSIONS AND WORKSHOPS

This professional development program for in-house counsel and human resources professionals is designed to keep you informed about the latest legal developments and best practices.

- |             |  |
|-------------|--|
| February 5  | CASL: Is Your Organization Ready?  |
| February 12 | Judicial Review: Taking a Decision from the Tribunal to the Courthouse, and How to Do It Successfully* |
| February 21 | Workplace Investigation Training   |
| February 26 | Psychological Disabilities and the Workplace: WSIB and Human Rights Implications*                      |
| March 5     | Just Desserts: Executive Compensation Legal Issues, Best Practices and Trends for 2014*                |
| March 25    | Workplace Investigation Training   |
| April 23    | Emerging Challenges in the University Sector in Tough Fiscal Times*                                    |
| June 18     | Mid-Year Check-In: Key Developments in Labour Arbitration Law*   |

*\*CPD Accreditation pending, visit [hicksmorley.com/advantage](http://hicksmorley.com/advantage) for details.*

## CLIENT CONFERENCES 2014 ON YOUR MARK

Our biennial, complimentary client conferences reflect our commitment to keeping you informed about the latest developments and best practices, including strategies that can help your organization's human resource management.

Please mark the following dates in your calendar, and join us this coming spring at a location near you.

Toronto: **Breakfast sessions at our office with eight dates to choose from:**

**April 1, 3, 8, 10, 15, 22, 24 and 29**

Ottawa: **May 9**

Kingston: **May 13**

London: **May 28**

Waterloo: **June 4**

Visit [hicksmorley.com](http://hicksmorley.com) for details.

# HICKS MORLEY WELCOMES TWO NEW ASSOCIATES

We are pleased to announce that the following new associates have joined Hicks Morley's Toronto office.



## SHANE D. TODD

Shane Todd is a frequent speaker and author on human resources law developments, and represents employers in a broad spectrum of labour, employment, occupational health and safety, and human rights matters. With an undergraduate degree in human resources management and industrial relations and prior experience as a human resources professional, Shane employs a focused, strategic and practical approach to solving workplace problems. Shane was called to the Bar in 2009 and prior to joining Hicks Morley practised in the Labour and Employment Law group of a full service international law firm.

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## LAUREN I. COWL

Lauren Cowl currently practises in all areas of labour and employment law. She provides advice and representation to both private and public sector employers and management on a wide range of labour and employment issues including labour disputes, grievance arbitrations, wrongful dismissals, employment standards, employment contracts, and human rights and accommodation. Lauren received her Juris Doctor degree from Osgoode Hall Law School, where she received a Dean's Gold Key for her work as Managing Editor of the *Osgoode Hall Law Journal*.

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## NEW PARTNER

Hicks Morley is pleased to announce the addition of a new partner into the partnership.



### JONATHAN A. MAIER

Jonathan Maier is a partner in Hicks Morley's Toronto office. He practises in all areas of labour and employment law and has appeared before the Ontario Labour Relations Board, the Superior Court of Justice, the Divisional Court and various labour arbitrators and mediators. Jonathan acts on behalf of a wide variety of private sector clients in both Canada and the United States along with several public sector organizations in Ontario including municipalities, police services boards and universities.

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### HR QUICK HITS

## Recent employment law cases from the Ontario Court of Appeal

In *Bernier v. Nygard International Partnership*, the 54-year-old plaintiff was terminated without cause after 13 years of service and was only provided with her minimum statutory entitlements. The motion judge granted the plaintiff summary judgment and awarded 18 months' notice, finding that a void termination provision in her employment contract was not evidence that she was only entitled to receive the minimum statutory entitlements. Evidence was also lacking that the plaintiff had been presented with, or agreed to, a revised contract limiting her entitlement upon termination. The Ontario Court of Appeal upheld the decision, noting that the appellant employer failed to raise any direct or indirect evidence regarding a meeting where the respondent's employment contract was allegedly discussed. There was no basis to interfere with the notice award.

In *Loyst v. Chatten's Better Hearing Service*, the Court upheld damages awarded to an employee who repudiated her employer's unilateral change to her employment contract and quit. It rejected the argument that the employee should have mitigated her damages by staying in the position with the new proposed terms, stating, "Put simply, the appellant took that option away when he terminated the respondent's employment."



## THANK YOU, CHRIS

On January 1, 2014, Christopher G. Riggs, Q.C., retired from the partnership after 44 years of practice.

Chris joined Hicks Morley in 1972 and was the firm's Managing Partner from 1994 to 2002. Recognized as the pre-eminent counsel on the management-side bar, he has been a leading contributor to the development of Canadian labour, employment, administrative, human rights and pension law. Among numerous professional distinctions, he is a Fellow of the American College of Trial Lawyers and was presented with an honorary Doctor of Laws (*honoris causa*) degree from the University of Guelph in 2013. Chris is a role model for generations of young lawyers at the firm. We thank him for his consummate professionalism and leadership, and wish him all the best as he embarks on this next phase of his life.

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