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In this issue:

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HUMAN RESOURCES
LAW AND ADVOCACY

LIMITS PLACED ON DUTY TO ACCOMMODATE

Arbitrator finds that employer need not provide digital hearing aids to hearing impaired employee.

BY: ELIZABETH KOSMIDIS

Employers continue to grapple with the scope of the duty to accommodate under the *Human Rights Code*. It is now accepted that the duty may require, among other things, modifications of an employee's position or workplace. But what about personal assistive devices? Is an employer required to provide those as well? In *Re Toronto District School Board and Elementary Teacher's Federation of Ontario,* (June 29, 2007), an arbitration panel chaired by Arbitrator Pamela Picher answered these questions in the negative.

HEARING AIDS AND DISCRIMINATION

The case involved a hearing impaired teacher and the question of whether the School Board was required to provide the teacher with digital hearing aids. The Federation argued that the School Board's failure to provide digital hearing aids was discriminatory, and that the School Board had not demonstrated undue hardship to justify its position.

The Federation relied on the Supreme Court of Canada decision of *Meiorin* to assert that the School Board could only justify its alleged discriminatory policy if it could establish a *bona fide* occupational requirement and that it would constitute an undue hardship to provide the digital hearing aids, the cost of which was $3,470.00.

The School Board argued that a hearing aid is a personal assistive device that enables individuals to function in society generally, outside of the workplace, and that an employer's duty to accommodate is limited to modifications to the workplace and does not extend to providing personal assistive devices of this sort. The School Board also argued that the *Meiorin* test was not applicable to this case, as *Meiorin* dealt with performance standards.

DUTY TO ACCOMMODATE FOCUSED ON WORKPLACE ALTERATIONS ONLY

Arbitrator Picher agreed with the School Board, and found that the *Meiorin* test did

not apply as the alleged discrimination did not involve work performance standards. Because of this, the question of undue hardship did not arise. Arbitrator Picher also addressed the issue of whether an employer is required, under its duty to accommodate disabled employees, to provide personal assistive devices such as hearing aids. She found that an employer's duty to accommodate is properly focused on altering the workplace and work methods, and not on the employee's person or body.

Arbitrator Picher concluded that providing personal bodily assistive devices that enable an employee to better take part in life's normal functions is not a job-related obligation which forms part of the employer's duty to accommodate, even when such devices would better enable the disabled employee to perform his or her job.

This decision is one of the few cases to date that have addressed the question of personal assistive devices, and provides an excellent analysis of the limits on an employer's duty to accommodate.

Elizabeth Kosmidis is an associate in the firm's Toronto office, and advises clients on all issues relating to attendance management and accommodation, with expertise in workers' compensation and occupational health and safety legislation. She successfully argued this case on behalf of the School Board.

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UPCOMING CONFERENCE

On November 22, 2007, the Pension & Benefits Practice Group at Hicks Morley will be hosting its annual Pension & Benefits Law Update. This year's program features pension plan investment trends, the impact of privacy law on benefits administration, DC plan issues, recent developments in pension plan fees and expenses, as well as a quick review of current hot topics and case developments.

For more information about this conference, or to register, please visit:
www.hicksmorley.com/hicksmorley/services/services/conferences.html

THE NEW FACE OF ACCESSIBILITY IN ONTARIO

New province-wide accessibility standards are being developed and implemented – and changes will be coming soon.

BY: PAUL E. BROAD

Accessibility standards in Ontario are changing, and employers should take note of developments that will be occurring in coming months, as most employers will be affected at some point in the future.

The *Accessibility for Ontarians with Disabilities Act, 2004* ("AODA") came into force in June 2005. Its fundamental purpose is to make Ontario accessible for persons with disabilities by 2025. This is being accomplished by the gradual establishment and implementation of accessibility standards that will apply to most organizations and employers in Ontario.

The accessibility standards are being developed in a collaborative fashion by standards development committees comprised of persons with disabilities, representatives of industry and sectors of the economy, and representatives of government.

ACCESSIBILITY STANDARD	STATUS OF COMMITTEE WORK
Customer Service	The standard has been approved and regulations have been issued – see discussion below.
Transportation	A draft standard has been released for public comment.
Information and Communication	The committee has been appointed and meetings are ongoing.
Built Environment (i.e., making buildings and other spaces accessible)	The committee members are being chosen, and the committee is expected to begin meeting in the autumn.
Employment	The committee members are being chosen, and the committee is expected to begin meeting in the autumn.

These standards are being given the force of law through adoption as binding regulations. While voluntary compliance is a goal of the legislation, the AODA will eventually have an enforcement process involving inspectors, directors and the oversight of a tribunal.

The development of specific standards is now well underway. There are currently five committees working on accessibility standards in different categories. The chart above provides an overview of where their work stands.

FIRST STANDARD ADOPTED

As the chart shows, the customer service accessibility standard is the first to be developed, and has been adopted by regulations, which will come into force on January 1, 2008 (the regulations are entitled, "Accessibility Standards for Customer Service", O. Reg. 429/07). By reviewing these customer service standards, other employers and organizations can gain an understanding of the sorts of obligations they will face under the AODA in the future.

The customer service accessibility standards will apply to the broader public sector (e.g., government, Crown agencies, municipalities, hospitals, universities, school boards, etc.), as well as to "every other person or organization that provides goods or services to members of the public or other third parties and that has at least one employee in Ontario" – so the standard will apply very broadly in the private sector as well.

The regulations establish several basic requirements that apply to all providers, public and private. Under the regulations, providers must:

- establish policies, practices and procedures governing the provision of goods or services to persons with disabilities;
- permit the use of service animals or support persons, and facilitate alternative measures where the use of service animals is otherwise prohibited by law;

- provide notice of temporary disruption of services or facilities usually used by persons with disabilities;
- provide training to all persons (employees, agents, volunteers, etc.) who act on behalf of the person or organization and to all persons who participate in the development of policies, practices and procedures (The training is quite wide-ranging and is intended to cover training related to specific types of disabilities. A number of "Tips" documents have been prepared to assist with training.); and
- provide for a feedback process.

All public sector organizations and those private sector organizations with at least 20 employees will have to reduce the above requirements to writing, and prepare documents that can be provided to individuals upon request (including in a format that takes into account an individual's disability). In addition, these same organizations will have an annual reporting requirement. The accessibility standards will begin to apply to the public sector on January 1, 2010 and to all other providers on January 1, 2012.

As noted, a draft accessibility standard for transportation has been released for public comment, and we can expect a regulation to be released sometime in the next few months. This standard will apply to a wide variety of transportation initiatives, including public transit systems, taxi services, and transportation services provided by school boards, hospitals and nursing homes.

TERMS OF REFERENCE FOR OTHER STANDARDS

For other accessibility standards, "terms of reference" have been issued. The terms of reference for the employment standard state that the focus is to be on "paid employment practices, and related to employee-employer relationships, including recruitment, hiring, and retention policies and practices." Obviously, this is a very wide-ranging area, and it remains to be seen what specific requirements will be established.

The AODA will not replace the *Human Rights Code*, which will continue to apply to employers and other organizations in Ontario. However, the AODA will establish definable standards that are likely to be seen as a minimum standard, but which may need to be surpassed to comply with the *Code*. Employers should strive to keep abreast of the developments under this statute to ensure they are aware of the requirements they must meet.

For more information, you can call any Hicks Morley lawyer or visit: www.mcss.gov.on.ca/mcss/english/pillars/accessibilityOntario

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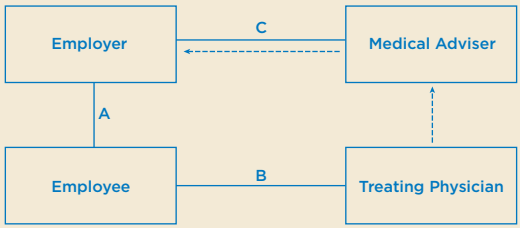
THE A-B-Cs OF MEDICAL INFORMATION MANAGEMENT

BY: DANIEL J. MICHALUK

Role definition in employee medical information management is important if the management process is to be successful. In this short article, we describe the three relationships that define a typical model by which employers manage medical information – one in which the employer seeks information from an employee's treating physician through its own medical adviser.



Relationship "A" is the employment relationship. In most cases employers cannot obtain employee medical information without express written consent, but employees have a duty to consent to the release of medical information when it is reasonably necessary to the administration of the employment relationship. Employers typically need medical information for four purposes:
(1) to determine the validity of an absence,
(2) to determine eligibility for an income protection benefit,
(3) to develop accommodation plans and proposals, and
(4) to ensure that employees can safely return to work.

Relationship "B" is the treatment relationship. An employee's treating physician has a professional and legal duty to act in

the employee's best interests. This does not mean that a physician must let a patient dictate his or her opinion. To the contrary, abdicating professional judgment in this manner is a breach of a physician's duty. Treating physicians also have a professional and legal duty to maintain patient confidentiality. They are subject to the full range of "health information custodian" rules in the *Personal Health Information Protection Act, 2004* ("PHIPA") and may only release medical information to employers based on written consent.

Relationship "C" is either an employment or contractual relationship. Employers often retain the services of medical professionals to act on their behalf. These professionals typically: (1) take custody of medical information received pursuant to a release and share it with management as permitted by the medical release and on a "need to know" basis, (2) evaluate and make objective recommendations to the employer about the sufficiency of information provided and about eligibility for paid or unpaid leave, accommodation plans and return-to-work, and (3) act as the employer's liaison with the treating physician.

The medical adviser does not have independent legal or professional duties to the employee. He or she acts as the employer and shares the employer's duty to abide by the terms of the signed release. Does he or she nonetheless play an important role in medical confidentiality? Yes. The medical adviser role helps create a confidentiality screen. By taking immediate custody of the medical information on behalf of the employer, he or she is the means by which the "need to know" rule is given effect. This is a difficult role, and sometimes out of a sense that he or she has an independent duty of confidentiality to the employee, the medical adviser takes a position at odds with the employer. This type of conflict can generally be avoided by establishing a reasonable and PHIPA-compliant policy to guide the internal distribution of medical information received pursuant to a medical release.

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HICKS MORLEY WELCOMES BACK TWO ARTICLING STUDENTS AS ASSOCIATES

NATASHA D. MONKMAN

Natasha Monkman joined the firm in 2005 as a summer student. Prior to articling with the firm in 2006, Natasha received her Bachelor of Arts (Honours with distinction) from Mount Allison University and her LL.B. from Osgoode Hall Law School. Natasha is a member of Hicks Morley's Pension & Benefits Practice Group, and works in our Toronto office. Natasha advises clients on pension plan interpretation and administration, statutory compliance, member communications, and undertakes the review and drafting of contracts.

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Eric Bizier is a bilingual associate in the Ottawa office. Eric received his B.A. (with distinction) from Carleton University in 2003, his LL.B. from the University of Ottawa in 2006, and was called to the Bar in 2007 after articling with the firm. Eric has been a Sessional Lecturer at Carleton University where he taught a law course to undergraduate students. He has over 60 hours of training in mediation and negotiation. Eric currently practises in both official languages in all areas of labour and employment law, including education law and related matters.

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A FIRM COMMITMENT

Stephen Shamie started with Hicks Morley as its first ever summer student in 1985 and has watched the firm grow from 18 to over 90 lawyers over the past 20 years. Now as the fourth Managing Partner in the firm's history, Steve took some time with *FTR Quarterly* in September to reflect on the dramatic changes that have taken place in labour and employment law and the role Hicks Morley will be playing in the future.

You've been with the firm for over 20 years. What was the firm like when you first arrived?

There were just 18 lawyers and our core business was what some might call traditional labour and employment law. That's still a large part of our work today but we do much more than that now.

Why the expansion in the firm's focus?

Our goals have always been to provide exceptional client service and leading edge advice – that hasn't changed. But to do this, we've had to stay ahead of the public policy, statutory and demographic curves. Areas like pensions, human rights, information and privacy, health and safety and pay equity – these are all areas that have only relatively recently been cast into the workplace spotlight.

I also think we have some of the brightest lawyers practicing law in Canada today, and we've been able to forecast the trends our clients are going to be grappling with. That's let us expand our expertise to ensure we can provide the right advice at the right time. We know our clients expect it, so we're committed to staying one step ahead of the issues that sit around the corner.

Any trends for the future?

I can think of a couple. The boom in our advocacy work is a big one. Our extensive background in the courts and the breadth of our tribunal and rights arbitration work has been key in allowing us to help clients respond to the huge increase in employment litigation in Canada. We've also had to extend our advocacy skills into a host of new arenas – such as class actions and pension litigation – so we've prepared ourselves to respond to any one of the new advocacy challenges.

> Every legal decision we make has a business impact.

The other trend that comes to mind is strategic advice and planning. The days of long opinion letters are gone. Clients expect us to roll up our shirtsleeves and be problem solvers alongside the senior management team. We've really thrived in this role and I think it's provided great added value for our clients. We've got a lot of great thinking, expertise and experience to share, and clients are really leveraging this now. We also have the size and resources that we need to respond quickly as the work unfolds, because the pace of business is faster than ever. From our end, we're pretty excited about the opportunities that lie ahead in playing a strategic role.

How has your role as managing partner changed your practice?

I know a lot of managing partners give up their legal practice and focus full-time on firm management, but I think it's critical for me to stay in touch with the law to carry out this role. So I've continued to practice.

We have many leaders in our firm, including practice group leaders, who all contribute to the effective operation of the firm. We're also lucky in having exceptional people heading each of our offices outside of Toronto who have grown up with the firm and know our culture. All of this makes my management role a lot easier.

What are the key challenges for Hicks Morley going forward?

I think our biggest challenge and the biggest differentiator for us will be client service. There are some very competent firms that do our type of work and we have to differentiate ourselves not only on our legal skills, but on our service skills as well.

We don't want to be thought of as just legal services providers – we want to solve problems and be a partner with our clients. That's why we have clients who have stayed with us for decades. I think one of my key roles as managing partner is to challenge our lawyers to find new ways to add value – and I don't mean doing it once and we're done. We have to continually evolve because the world is changing and client needs and expectations are changing with it.

How do you think client expectations are changing?

Clients today are right in expecting that their external counsel will come to know and understand their business. Every legal decision we make has a business impact, and for lawyers today, business concerns and risk assessment are critical factors that clients expect us to factor into every situation. That means anticipating issues and helping to solve problems before the litigation starts. We've got a terrific group, and I'm proud of the fact that this 360 degree thinking is a focus for each and every one of our lawyers.

I'd also say that our clients appropriately expect availability, something that technology has enabled. It means being available 24/7 and I think this is the new benchmark for service. If we can understand our clients' businesses, stay on top of legal issues, and be there when they need us, we are in the best possible position to serve our clients.

What's behind this new publication?

I had the chance to meet with a group of about 20 clients a few months ago and ask them what more we can do to serve them. One of the things I heard was that our firm's publications, like *For The Record*, are a resource our clients use. So we've expanded it, and are putting more time and energy into these publications. We're also launching a new website as well which we think will enhance the client experience while profiling the breadth of our practice at the same time. I'm looking forward to getting some feedback on these initiatives as we roll them out.

HR QUICK HITS

New Private Security Act now in force

On August 23, 2007, the *Private Security and Investigative Services Act, 2005* came into force and replaced the *Private Investigators and Security Guards Act*. The new *Act* expands the scope of mandatory licensing requirements and training standards to include security guards and investigators who are employed directly by organizations, regardless of whether the organization is in the business of providing security or investigation services to the public.

For more information about the new *Act* and regulations, please consult the Hicks Morley Client Update "New Private Security Act Comes Into Force" (September, 2007), which is available at:
www.hicksmorley.com/hicksmorley/publications/updates/2007/CU_NewPrivateSecurityAct.htm

NOT YOUR TYPICAL WRONGFUL DISMISSAL ACTIONS

Tort claims for infliction of mental distress, alleged breaches of corporate governance policies, punitive damages, employee class actions, injunctions to prevent departing employees from leaving with knowledge and information belonging to the employer – gone are the days of the simple wrongful dismissal claim.

The members of Hicks Morley's Litigation Group are seeing a rapid expansion in the nature and variety of claims that employers are having to deal with. In the next few pages members of the Group discuss some of these developments.

A TORT EVOLUTION

Tort claims are continuing to make inroads in employment-related litigation. Claims of infliction of mental distress, misrepresentation, and interference with economic relations are becoming commonplace. In some cases they are paired with actions for wrongful dismissal and in others they are being pursued against employers as stand-alone claims.

"There is definitely an evolution taking place," says Andrew McCreary of Hicks Morley's Ottawa office. By way of example, the British Columbia Court of Appeal recently dealt with a claim of negligent infliction of mental suffering brought by an employee against her employer and supervisor after the supervisor harassed the employee to the point of total and permanent disability. The employer was found vicariously liable for the harassment and the Court upheld a damages award of approximately $950,000.00.

"These claims are raising the stakes for employers, and they must be aware of the potential for such claims in making decisions before, during, and after the termination of employment," advises McCreary.

PUNITIVE DAMAGES CLAIMS RISING

Ian Dick, Chair of Hicks Morley's Litigation Group, and located in the Toronto office, sees the increasing number of claims for punitive damages as cause for concern.

"Punitive damage awards for breach of employment contracts have gone from being exceptional to commonplace," notes Dick. This means the employer's conduct in terminating the employee is going to be on trial, not just the terms of the employment contract.

You do not have to look any further than the recent decision in *Keays v. Honda Canada Inc.* – a $100,000.00 punitive damages award – for an example of the problems this can pose for an employer. As Dick points out, "even if completely unfounded, claiming punitive damages will have the effect of putting an employer's conduct on trial, which will invariably lead to greater acrimony, lengthier proceedings and greater financial exposure."

With claims for punitive damages on the rise, pre-termination advice on how to go about parting company with an employee is now every bit as important as advice on the reasonable notice period.

FAREWELLS – BUT NOT SO FOND

Another emerging trend in this area is pre-emptive litigation commenced by the employer to stop a departing employee from taking valuable information to his or her new place of work.

"The departing employee often poses a significant risk to an employer's revenue base, trade secrets and other assets," according to Kim Pepper of Hicks Morley's Toronto office. "Unfortunately, many employers do not discover the extent of their potential exposure to loss until the employee actually resigns or is terminated."

While the law generally protects an employer from the unauthorized disclosure of confidential information by a departing employee – even in the absence of a policy or written agreement – the law does not automatically imply an obligation for a departing employee not to solicit customers or employees of his or her previous employer nor to engage in competition.

Employers can work around this uncertainty by entering into specific contractual restrictive covenants with key employees at the date of hire or promotion.

"Recent case law suggests that employers who are rigorous in deciding which employees should be subject to such covenants, and diligent in drafting such covenants, stand a better chance of protecting their business and proprietary interests in any ensuing litigation," says Pepper.

GOVERNING YOURSELF ACCORDINGLY

One other cause of employment-related litigation that's on the rise is the breach of corporate governance policies. Steve Gleave of the Toronto office has recently seen a number of these actions, with the breaches having significant consequences for the employer. For example, an employee's failure to comply with accounting practices could require the employer to restate its financial position.

"When dismissed for cause, these employees have brought actions claiming millions of dollars for wrongful termination and denial of bonuses," notes Gleave. "To successfully defend these claims, it is critical that employers establish that the corporate governance practices were part of the employer's culture and a daily requirement of every employee's job – with termination as a consequence for serious breaches."

This means the employer must have a clear record establishing what corporate governance policies were in place, the

importance of these policies to the employer, and that the employee was aware of the importance of complying with these policies and that termination was a consequence of any breach.

NOT A CLASS ACT

While there is no doubt that individual employment-related claims have become more complex, another type of complex litigation is also increasing – the class action. And it's important for employers to know the signs.

"The potential for a class proceeding increases in a number of situations – such as mass terminations and plant closures, unilateral changes to common terms of employment contracts, and changes to benefit programs and pension plans, including claims to pension surplus," says John Field of Hicks Morley's Toronto office.

Of course, creative plaintiff counsel haven't limited such actions to those situations.

"Employers have had to defend class actions involving a breach of fiduciary duty, occupational health and safety and environmental damage claims, and negligent misrepresentation," says Field. "And most recently, large employers in Canada have become the target of proposed class overtime claims as well."

Given the stakes involved, it is critical for employers to understand the way class proceedings work, including the certification process, and to review policies and proposed actions and get advice in advance to minimize the risk of a class action occurring or succeeding.

LITIGATION TRENDS ARE HERE TO STAY

With the trends to more complex employment claims quickly becoming entrenched, it's no longer enough for employers simply to provide an ample notice period and hope that the departing employee goes on to a happy and successful career elsewhere.

Forethought and planning is now required to ensure that an employer's business and economic interests are adequately protected in this new age of employment litigation.

HICKS MORLEY – LITIGATION GROUP

Our Litigation Group represents the firm's clients in all areas of the law, including, labour, employment and human resources matters, pension matters, class action proceedings, administrative law and appellate advocacy. Our reputation as effective advocates for our clients has been earned from numerous representations before labour arbitration boards and other administrative tribunals such as the Human Rights Commission, Workplace Safety and Insurance Appeals Tribunal, Pay Equity Tribunal and Financial Services Tribunal, and regular appearances as counsel before the Ontario Divisional Court, the Ontario Superior Court of Justice, the Ontario Court of Appeal and the Federal Court in civil actions, injunctions, judicial review and appellate proceedings.

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HUMAN RESOURCES
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