FTR QUARTERLY

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In this issue:

Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

AVOIDING THE PAY EQUITY SHOCK

With legislation that dates back almost 25 years, it is not surprising that some employers have taken a "been there, done that" approach to pay equity compliance. Despite the perception of pay equity as yesterday's HR requirement, it is in fact alive and kicking in Ontario – and more importantly, can carry significant financial liability for employers who fail to comply.

"Many employers are shocked when they find out what their potential exposure could be," says Carolyn Kay, Chair of the Hicks Morley Pay Equity Practice Group. "The Pay Equity Commission is becoming more aggressive – not less – in its investigation of files, and many employers are being caught by the random audits that they're conducting."

The consequences of non-compliance can be significant, and include the potential for interest on retroactive payments (which can now date back 20 years), no time limits for filing a complaint, the ability of former employees to launch complaints years after the fact, and the ability of unions to pull out of agreements reached years previously.

TIMES CHANGE – MAKE SURE YOUR PLAN DOES TOO

There are good reasons why pay equity plans need to be reviewed at a regular interval once they are developed – and a key one is because few organizations maintain the status quo for any length of time.

Some corporate changes – such as a takeover – can happen quickly, with little thought to the pay equity implications. Conversely, changes can evolve slowly over time and years can slide by with little or no realization that pay equity could be affected.

"There are a number of ways in which the evolution of the workplace can require changes to an organization's pay equity plan," says Lauri Reesor, an associate in Hicks Morley's Toronto office.

"Changes such as the creation of new jobs, mergers and amalgamations, sales of a business, the loss of male job classes or other substantial changes to jobs over the years can lead to maintenance issues and resulting wage gaps."

And because employees can bring individual complaints to the Pay Equity Commission – even in a unionized environment – it is important to head off complaints through proper employee communication of your plan and its compliance status.

While the concept of equal pay for work of equal value is simple on its face, the analysis that is needed to create a pay equity plan can be complex. That is why professional help in reviewing or creating a plan can be an investment worth making.

"Even if your plan is sound, if an employee is not convinced that that is the case, they can file a complaint," says Tom Agnew, an associate in the Hicks Morley Toronto office. "To avoid this, it's often a good idea to maintain two-way communication with employees and show them how a particular plan does in fact comply with the *Act*."

PAY EQUITY AS PART OF PAY STRATEGY

One of the more recent uses of pay equity laws is to achieve wage increases in cases where they otherwise wouldn't happen.

In particular, the provincial government's wage restraint legislation – which resulted in a two-year compensation freeze until March 2012 – has increased activity on the pay equity front, as pay equity adjustments were specifically excluded from the legislation.

"The wage restraint legislation revived some of the talk around pay equity because public sector employers have been able to channel additional funding to their pay equity obligations during the freeze," says Craig Lawrence, an associate in Hicks Morley's Toronto office.

"This piqued the attention of national unions, which are now re-evaluating their pay equity positions in collective bargaining for public and private sector employers alike. This means that even private sector employers who weren't affected by wage restraint legislation directly may be hearing from their unions about the status of pay equity in the workplace."

A COMPLEX PROCESS

While the concept of equal pay for work of equal value is simple on its face, the analysis that is needed to create a pay equity plan can be complex. That is why professional help in reviewing or creating a plan can be an investment worth making.

"We've worked with clients in developing and reviewing pay equity plans since the legislation was introduced and have over 20 years of experience in working with the Review Officers from the Commission," says Carolyn Kay. "We handle the majority of cases before the Tribunal of represented employers and have been counsel in the leading cases, so we know them and they know us. It gives us a lot of credibility when we take a position on behalf of our clients."

However you decide to approach pay equity in your workplace, the key is to take action to ensure you understand any potential liabilities and what's needed to comply with the legislation. With the considerable financial consequences of non-compliance, it's an important step for every organization to take.

MOVIN' ON UP

There's more to the Hicks Morley Toronto July 1 office move than a higher floor and a change of address. The firm is using the opportunity to totally redefine the client experience.

Change often brings opportunity, and nowhere is this more true than with the move of the Hicks Morley Toronto office on July 1, 2011.

"We've been in the TD Tower for more than 20 years now, and the space has served us well, but we saw an opportunity to do something entirely different in this new space, and we're making the move," says Stephen Shamie, Hicks Morley's Managing Partner.

The move isn't far – across the courtyard to 77 King Street West, in the former Royal Trust Tower that still forms part of the TD Centre. But the real change is in how the office space is being used.

"We've taken out space on three floors instead of two, and the top floor – floor 39 – will provide a great client experience," says Elizabeth Brown, Hicks Morley's Client Growth and Development Partner. "We've created a conference floor, with meeting rooms and three large conference

rooms that combine into one and create space for meetings and seminars of up to 100 people."

The top floor also houses the Hicks Morley library – a beautiful glass-walled space viewable from the reception area – and the library will be open to lawyers and clients as well.

"We're going to bring in-house most of the knowledge sharing and client education that we used to do externally," says Shamie. "Beginning in 2012, we will be providing an ongoing client conference series that we'll hold in our new space. And we'll be hosting a variety of other seminars on our conference floor as well."

With the building recently renovated to achieve LEED Gold certification, clients are assured of an "environmentally friendly" welcome whenever they visit.

"Our firm has always placed a high priority on sharing knowledge with clients," says Shamie. "We learn from them and they learn from us – and we're excited to build an exclusive space that takes this great tradition and makes it even better."

As of July 1, 2011, the Hicks Morley Toronto office will located at the Toronto-Dominion Centre, 77 King Street West, 39th Floor, Toronto, Ontario M5K 1K8.

HR QUICK HITS

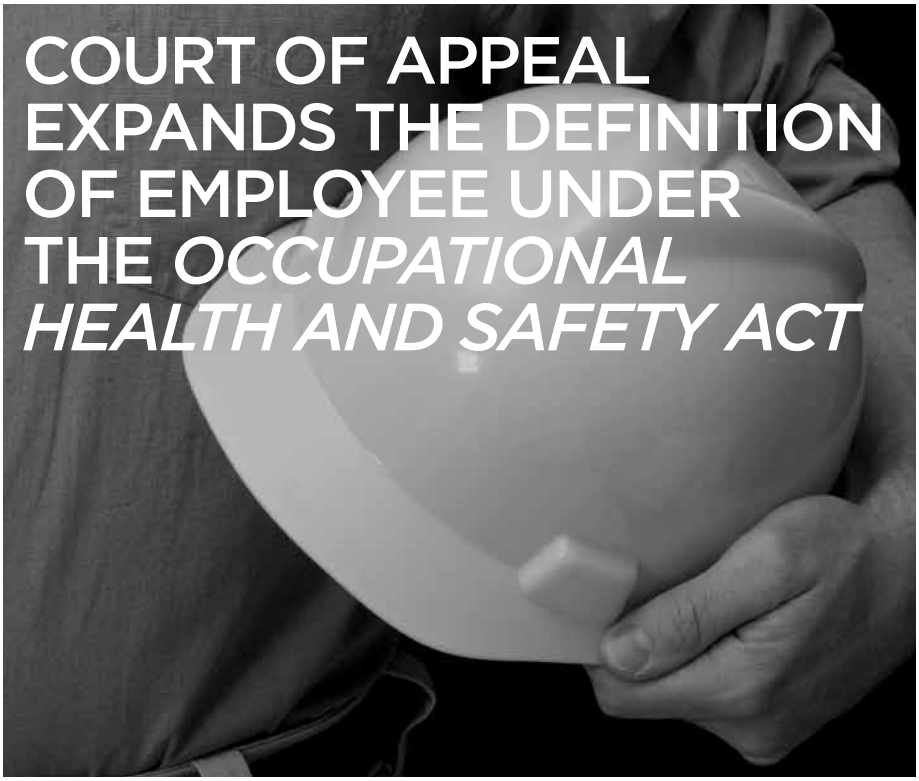
Does cause at common law equal "wilful misconduct"?

A Superior Court judge has reaffirmed the principle that having cause for termination at common law does not necessarily equate to "wilful misconduct, disobedience or wilful neglect of duty" for the purposes of the *Employment Standards Act, 2000* ["*ESA*"].

In *Oosterbosch v. FAG Aerospace*, the employee had a lengthy disciplinary record, including instances of lateness, unsubstantiated absences and persistent careless performance. The trial judge concluded that the employer had cause to terminate the employment relationship, so no damages were owing under the common law.

However, under the *ESA*, in order to be disentitled to termination and severance pay, an employee must have engaged in "wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned…". The trial judge found that while the employee's conduct was persistent, casual and careless, it was not "wilful" in the sense required under the *ESA* exemption. Therefore, despite the employer having cause to terminate the employment relationship, the employee was entitled to statutory termination pay and severance pay.

COURT OF APPEAL EXPANDS THE DEFINITION OF EMPLOYEE UNDER THE *OCCUPATIONAL HEALTH AND SAFETY ACT*



A recent decision of the Ontario Court of Appeal in *R. v. United Independent Operators Limited* has broadened the application of the *Occupational Health and Safety Act* ("*OHSA*") by finding that independent contractors are employees for the purposes of determining whether or not a joint health and safety committee ("JHSC") is required in a workplace.

BY: ROBERT W. LITTLE AND NADINE S. ZACKS

Prior to this decision, the law in this area had been set out in a decision of the Ontario Labour Relations Board, *Re 526093 Ontario Inc. (c.o.b. Taxi Taxi)*, which had held that only workers in a traditional employment relationship with their employers were to be counted in determining whether or not a JHSC was required. With this recent decision of the Ontario Court of Appeal, independent contractors must now be included in the count as well, and employers who previously were not required to establish a JHSC may now have that obligation.

MEET THE NEW *OHSA* WORKER

The employer in this case, United Independent Operators Limited ("United"), was a load broker that contracted with truck drivers to pick up sand, gravel and crushed stone and transport it to United's customers. United's relationship with these truck drivers had all the hallmarks of an independent contractor relationship: the truck drivers independently owned and operated their own trucks, paid United a fee for its dispatch services, paid all taxes, fees and tolls, arranged and paid their own Workplace Safety and Insurance Board coverage, could work for others and could refuse opportunities offered by United. They only went to United's offices to submit paperwork. By all the tests traditionally used to determine who is an employee, these truck drivers were not.

Employers who have few employees and who contract out the majority of their work will now be required to establish and maintain a JHSC, and will have to include representatives from that group of independent contractors on the committee.

However, when one of the drivers was critically injured and the Ministry of Labour conducted an investigation into the accident, it determined that United had violated the *OHSA* by failing to establish and maintain a JHSC, and ordered it to do so. The Ministry also laid charges against United for failing to have a JHSC at the time of the accident. Section 9(2)(a) of the *OHSA* requires a JHSC to be established "at a workplace at which 20 or more workers are regularly employed."

United disputed the charges, arguing that since it only had 11 full-time employees, it was not required to establish a JHSC.

According to United, since the drivers were independent contractors, and had been found to be so by the Workplace Safety and Insurance Board, Revenue Canada and the Employment Standards Branch of the Ministry of Labour, they were not "regularly employed" by United.

At trial, United's argument was accepted, and United was acquitted of the charges. The Ministry of Labour's appeal to the Ontario Court of Justice was dismissed, but was ultimately upheld by a unanimous Court of Appeal ruling in January of this year.

THE DECISION EXPLAINED

Justice Eileen Gillese for the Court of Appeal held that the words "regularly employed" had to be interpreted in the context of the *OHSA* as a whole. In the *OHSA*, "worker" is defined as "a person who performs work or supplies services for monetary compensation" and therefore the truck drivers were clearly workers. This was not a surprising finding, as the *OHSA* definition of "worker" has long been held to include independent contractors. The term "employer" is defined in the *OHSA* as "a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services." Finding that United was an "employer" under the *OHSA*, she held that it accordingly "stands to reason that the truck drivers are employed by [United]."

The question then became whether or not the truck drivers were "regularly employed" by United so as to require United to establish a JHSC. Since the evidence had revealed that it was "normal or customary" for United to have between 30 and 140 drivers working for it, Justice Gillese found that United "regularly" employed truck drivers.

In reaching this decision, the Court of Appeal placed great emphasis on the purpose of the *OHSA* as remedial public welfare legislation that is intended to guarantee a minimum level of protection for the health and safety of workers and which, according to the Court, meant that it should be interpreted broadly and contextually. The Court held that if it were to interpret s. *9*(2)(a) as requiring JHSCs only in workplaces in which employers and workers stand in a traditional employment relationship, the scope of s. *9*(2)(a) would be seriously curtailed and would interfere with the purpose of the *OHSA*.

WHAT THIS MEANS FOR EMPLOYERS

This decision has important consequences for many employers. Employers who have few employees and who contract out the majority of their work will now be required to establish and maintain a JHSC, and will have to include representatives from that group of independent contractors on the committee.

Some of the challenges this would pose were presented to and acknowledged by the Court of Appeal. For example, independent contractors often work on their own timetables for a number of employers, and may only work for an employer for a short period of time. If that independent contractor is a member of a JHSC, he or she will be unavailable to fulfill many of the duties of a JHSC, such as the frequent committee meetings and monthly investigations. Employers will have to regularly recruit and train new members of the JHSC, which can be costly and time-consuming.

Despite these challenges, the Court of Appeal's decision confirms that courts are going to continue to take a broad view of the application of the *OHSA* to contractors and interpret the *OHSA* broadly in order to capture as many workers as possible in Ontario.

Robert Little *is a partner in Hicks Morley's Toronto office and works extensively in the occupational health and safety field. He routinely defends employers charged under the Occupational Health and Safety Act. He often speaks on health and safety matters and has provided training to justices of the peace on health and safety prosecutions.*

Nadine Zacks *is an associate lawyer in Hicks Morley's Toronto office. Nadine provides advice and representation to employers and management on a wide range of labour and employment issues, with a particular emphasis on occupational health and safety matters.*

SOCIAL MEDIA – EMPLOYERS SHOULD DEAL CAUTIOUSLY WITH THE OUTSIDE AGGRAVATOR

The growth in popularity of social media has created a number of potential harms for employers. One of the most difficult to manage arises when employees are targeted by "outside aggravators" – often mean-spirited communicators who are not current employees, students or others whose conduct can easily be governed. Examples of targeting by outside aggravators include managers targeted by former employees, teachers by parents of students, and public officials by citizens.

BY: DAN J. MICHALUK

Employers must not react without careful thought beforehand. These scenarios require a sensitive management approach that recognizes the sometimes fine distinction between what is and is not an employer's responsibility, and what is and is not in the employer's best interest to address. Moreover, any response is complicated by the fact that, in most cases, the outside aggravator will be communicating on a third-party Internet site that is outside the employer's control.

THE SCOPE OF AN EMPLOYER'S DUTY

No employer likes to see its employees maligned publicly, especially when employees are targeted by persons whose attention they have attracted in the course of employment. Employees may suffer embarrassment, distress and significant reputational damage.

Employers, however, are generally not legally responsible for helping protect their employees' reputations. Unless they have made an express contractual promise to indemnify employees for reputational harms arising out of employment, employers can generally treat damage to reputation as a private harm and beyond their scope of responsibility.

There will be situations in which an employer and targeted employee's interests are sufficiently aligned to merit voluntary joint engagement with an outside aggravator.

A duty to help protect an employee's reputation is different than a duty to provide a safe and harassment-free workplace. The latter duty applies to all employers regardless of contract, but is a duty that is limited in scope to "the workplace."

Internet-based communications can constitute workplace harassment. For example, there is a strong connection to the workplace when one employee is targeted online by a group of other employees in relation to work-related activities. The connection to the workplace is usually less strong when employees are targeted by outside aggravators. And when the connection is strong enough to invite an employer duty to respond, the scope of this duty is typically confined to addressing workplace (as opposed to reputational) harms.

An employer's duty to provide a safe and harassment-free workplace may, for example, require it to send a letter to the subordinates of a manager who is targeted by a former employee as a means of addressing the workplace harms that flow from the attacks. If the workplace harms can be reasonably managed through such a process, it is questionable whether the employer has a further responsibility to attempt to have the offensive material taken down from the Internet.

VOLUNTARY ENGAGEMENT – HANDLE WITH CARE

Though many scenarios in which corporations are targeted do not warrant engagement, employers often want to help when an outside aggravator has targeted one or more employees. However, an outside aggravator's focus on individuals can generate strong feelings that affect the employer's decision-making. And "helping" can often seem a simple commitment at first.

There will be situations in which an employer and targeted employee's interests are sufficiently aligned to merit voluntary joint engagement with an outside aggravator. Joint engagement, however, should only be pursued after a full and frank discussion of each party's objectives, the potential costs of engagement, the personal burden that will be borne by the individual employee, the scope of the employer's responsibility and what will happen in the event the parties' objectives diverge. Ideally employer, employee and union (if applicable) will enter a written agreement that deals with all these issues.

Employers should be wary of voluntarily helping employees deal with an outside aggravator without such thought and agreement for two reasons.

First, employers risk engendering unintended expectations. Most significantly, a person who wishes to sue for defamation relating to Internet-based communications must comply with a short six-week time limit for serving a "notice of intended action." Employers who offer informal help may lead employees to miss this time limit by causing them to assume all is in hand.

Second, engaging an outside aggravator requires a level of commitment that is unlikely to be derived from informal collaboration. Sending one demand letter on an employer's letterhead without following through can damage an employee's position should he or she decide to pursue relief on his or her own, and may unintentionally escalate the situation.

CONCLUSION

It is unfortunate how often employees are the subject of an online attack that causes them to look to their employers for help. While we encourage employers to consider their duty to provide a safe and harassment-free workplace, they need to understand the limits of this duty – and engage in an open dialogue with their employees before making a decision to proceed with any action that potentially goes beyond it.

Dan Michaluk *is a partner in the Hicks Morley Toronto office and Chair of the firm's Information and Privacy Practice Group. In his privacy practice, Dan advises public and private sector clients on privacy compliance, records management and security breaches and frequently represents clients in responding to access to information appeals and privacy complaints. His "All About Information" blog won a Canadian Law Blog award in 2009 for Best Practitioner's Blog and he is a regular contributor to the Slaw.ca cooperative legal blog.*

HR QUICK HITS

Invasion of Privacy

In one of the few cases to directly consider the point (*Jones v. Tsige*, 2011 ONSC 1475), Whitaker J. of the Ontario Superior Court of Justice (and formerly Chair of the Ontario Labour Relations Board) has found that there is no freestanding tort of invasion of privacy in Ontario. Therefore, the claims based on this alleged tort failed.

HOSPITALITY PLUS

Donna D'Andrea was called to the Bar in 1998 and has been a lawyer at Hicks Morley ever since. With a focus on both the hospitality industry and the financial services sector, her practice spans all areas of human resources law, from labour relations and employment, to human rights, to occupational health and safety. Donna spoke to *FTR Quarterly* recently about the evolution of her career.

Tell us a bit about your start in life – where you grew up and went to school.

I was born and raised in Toronto and went to school here. I had a great experience in law school at the University of Western Ontario.

What drew you to law school?

I loved public speaking, and I was a public speaking champion right through elementary and high school. Every year that I won a competition, people would tell me that I should be a lawyer. It occurred to me that they may be on to something, and it turned out to be a really good fit.

Were the labour and human resources areas an interest then?

Before law school, I worked summers with the Ministry of Labour and learned a lot about collective bargaining, so I got some great exposure to the process at a very early stage. And while I studied and enjoyed all of the corporate and commercial law courses that Western had to offer, it was the advocacy side of things that I found most exciting. I was fortunate to be involved in a negotiation competition in my third year of law school, and that introduced me to a different element of our practice that I loved.

You articled at Hicks Morley?

Yes, I articled here in 1996 and was called to the Bar in 1998.

A large part of your practice is in the hospitality industry. How did that interest develop?

It actually started the weekend before I began articling. Some of my sister's wedding celebrations were held at the Westin Harbour Castle hotel. An ugly strike at the hotel disrupted part of the festivities. I was an eyewitness to what was unfolding and found the whole picket-line protocol fascinating to watch. Being held up on the picket line frustrated me to no end. When I arrived on my first day as an articling student, I discovered that Steve Shamie, our current Managing Partner, was the Chief Negotiator in that dispute. From that moment on, I was determined to become involved in the hospitality sector – things had really hit home!

I think human rights cases are a growing concern – complaints relating to family status and disability accommodation, for example. We're handling many of these cases at arbitration but some employees have taken their concerns directly to the Human Rights Tribunal.

What do you like about it?

The sector is a 24-7 operation, which makes it very dynamic. The issues that arise cover almost every area of our practice. And because it's heavily unionized, the labour relations aspect is a large focus. I have been the Chief Negotiator

for many of the city's hotel companies in the last year or so. The sector's largest union, UNITE HERE, had about 30 collective agreements expire last January. We dealt with an almost two-week strike at the Delta Chelsea in Toronto in 2010 that changed the landscape for all the other hotels with the same union. We're still negotiating many of the expired agreements. It's a very challenging process because the recent economic slump hit the hotel sector very hard – and it's still not up to previous levels of profitability. The union demands haven't really changed, though.

Any other trends in the sector?

I think human rights cases are a growing concern – complaints relating to family status and disability accommodation, for example. We're handling many of these cases at arbitration but some employees have taken their concerns directly to the Human Rights Tribunal.

We're also seeing human rights complaints involving hotel guests. That's another emerging area that we've got expertise in.

What other sectors do you work in?

Another large focus of my practice is in the financial services sector. It's predominately non-union, so it's a very different type of work. There's a lot of litigation involving senior executives and dismissal issues. One of the most current issues is the question of entitlement to non-cash components of compensation during a reasonable notice period. This wrongful dismissal work keeps me engaged in more traditional litigation in the courts. It keeps me busy!

What are your interests/passions outside of the office?

I try to stay involved with things that are completely different from my day-to-day work life. I'm a photographer by hobby, and I love to capture people when they least expect it – my five nieces and nephews are my best subjects. And I'm also an avid cyclist – so I do a lot of spinning in the winter and cycle outdoors in the warmer weather. I find that both are a great break from work – and a great way to re-energize.

IN MEMORIAM

RICHARD DRMAJ

1943-2011

It is with great sorrow that we note the passing of our retired partner and friend Richard (Dick) Drmaj on Saturday, March 5, 2011.

Dick joined the firm in 1974 and served the firm's clients with passion and a sense of humour. Dick was skilled as a lawyer and a mentor, and was a man of great integrity. He was well-liked and respected by everyone in the labour law Bar and lived his life to the fullest.

We will miss Dick, but we are richer for having been his colleagues.

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