FTR QUARTERLY

WINTER 2008

In this issue:

Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

DC PLANS – ENJOY THE SIMPLICITY BUT MANAGE THE RISKS

The late 1990s witnessed an exodus by employers from traditional defined benefit ("DB") pension plans to defined contribution ("DC") arrangements that promised stable funding and simpler administration. Ten years later, many employers are discovering that sponsoring a DC plan presents its own unique challenges.

While DC plans can be administratively less complex than their DB cousins, a failure to provide ongoing monitoring and maintenance can lead to some unintended but significant issues down the road. In this article, members of Hicks Morley's Pension and Benefits Practice Group comment on some of the areas in which DC plan sponsors should consider taking a proactive role.

MIND THE GOVERNANCE GAP

In 2004, Canada's financial regulators ignited interest in DC plan governance when they released the Capital Accumulation Plan Guidelines (the "CAP Guidelines"), a broad statement of best practices with respect to DC plan administration. Since then, interest in pension governance has percolated up to the highest organizational level.

"Boards of directors are taking a keen interest in the company's pension plans, and DC plans are no exception," says Elizabeth Brown, head of Hicks Morley's Pension and Benefits Practice Group. Decision-makers want a detailed checklist of DC plan administration tasks, including who is responsible for each task in order to identify any gaps in the governance process.

By law, the buck stops with the employer, but external service providers often perform the day-to-day administration. Employers should be reviewing their service provider agreements with governance in mind. "Employers are looking at their service provider arrangements to ensure that the provider is contractually held to a fiduciary standard, that their liability is not unreasonably limited, and that fees are reasonable," notes John Prezioso, an associate in the Group.

COMFORTABLY EVER AFTER?

Financial advisors estimate that Canadians need roughly 60% to 70% of their pre-retirement income to live comfortably in retirement. As DC plans mature, plan sponsors are asking whether their investment education, benefit calculators and projection tools are adequate to enable members to properly plan for retirement.

"Benefit adequacy education is an often neglected element of DC plan management," says Susan Nickerson, a partner in the Group. "If members don't understand what they can expect from their DC benefits, this presents a legal risk to the employer."

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A commitment to clear, effective communication is one key to mitigating this risk. Another is regularly encouraging members to seek independent financial advice. Financial advisors can help employees examine their own retirement lifestyle expectations in light of their total savings picture. Because not all employees will seek this advice, Nickerson stresses that "it's important to document your communication efforts to show that employees understood the benefits of such advice, even if they never pursued it."

IGNORE INVESTMENT OPTIONS AT YOUR OWN RISK

Many employers choose DC arrangements over traditional DB plans because, under a DC plan, investment risk is transferred from the employer to plan members. However, DC plan sponsors have an ongoing duty to examine the performance of the investment options under their plans and to ensure that members can choose from a range of options offering appropriate opportunities for diversification and liquidity, and varying levels of risk and expected return.

"Members should have a varied menu of investment options to choose from and be able to understand the risks and expected returns of each option," notes Stephanie Kalinowski, a partner in the Group. "And because investment products and investment managers are always changing, and the demographics of the plan members can shift over time, what's best for your plan and its members today may not be best a few years from now. That's why a regular review of your plan's menu of investment options is so important."

DON'T LOSE BY DEFAULT

Member indifference is a challenge facing many DC plan sponsors. In some plans, 40% of members are wholly invested in the default investment option because they failed to provide instructions on how they wanted their contributions invested.

"If a significant percentage of members are invested only in the default fund, this can be symptomatic of an ineffective investment education program," observes Lisa Mills, a partner in the Group who is located in the firm's Ottawa office.

The CAP Guidelines provide that DC plan members should be made aware of the risks of failing to provide investment directions, and they should be told about the characteristics and risks of the default investment option. However, industry standards continue to evolve, and simply providing this information at the time of enrollment may no longer be enough to mitigate risk.

"Employers are taking a fresh look at their DC plan's default investment option and asking whether it is too risky or too conservative in light of the demographic characteristics, experience and investment horizon of the plan's membership," notes Mills.

Plan sponsors need to stay on top of evolving governance standards and best practices.

IT'S NOT EASY BEING GREEN

More and more, members are asking their employer to add socially responsible investment ("SRI") options to the menu of funds in which members may invest their DC contributions. SRI funds are funds for which social, environmental and other non-financial criteria are used to select the underlying investments.

With demand for SRI options gaining steam, boards of directors and pension committees are under pressure to meet that demand while ensuring that the available investment funds provide competitive returns.

"Fund providers offer a wide range of 'ethical' funds, and plan sponsors must keep their fiduciary duty to plan members top of mind when dealing with SRI issues," says Jordan Fremont, an associate in the Group.

A decision to "go green" should be made carefully. "It involves much more than just adding a couple of funds," says Fremont. "You'll want to understand the risk profile of each new fund and consider any SRI additions in the context of your current investment lineup."

EVOLVING STANDARDS, ONGOING REVIEW

Change is a constant in the pension world, and while DC plans are an effective way of delivering retirement income benefits to employees, plan sponsors need to stay on top of evolving governance standards and best practices to ensure their risks are properly mitigated and the health of their plans is maintained.

Hicks Morley's Pension and Benefits Group advises employers on all aspects of pension and benefits law and management, as well as on a variety of employer-related tax issues. For more information on the Group, and the services that we offer, please visit the firm's website at www.hicksmorley.com.

CLIENT CONFERENCES 2008

Our complimentary client conferences are part of our commitment to you. Much like *FTR Quarterly* and other special advisories, they are designed to keep you informed of the latest developments and emerging issues in human resources law. They are also our way of thanking you for your business. Please mark the following dates in your calendar and expect to receive registration information shortly:

Toronto: May 12
Kingston: May 21
Waterloo: May 29
London: June 5
Burlington: June 10
Ottawa: June 19

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POUR LES EMPLOYEURS

Hicks Morley est fier d'offrir à ses clients l'expertise légale, et toute la gamme de services juridiques pour employeurs, en français. Notre cabinet comprend un groupe d'avocats parfaitement bilingues, qui sont appelés régulièrement à desservir nos clients dans la langue de Molière!

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Nous représentons également les employeurs en français lors de la négociation et la rédaction de conventions collectives, dans la préparation des contrats individuels d'emploi, et dans la rédaction de politiques en matière d'emploi. Enfin, nous offrons à nos clients œuvrant en langue française des séances de formation du personnel par rapport à une multitude de sujets, dont le harcèlement en milieu de travail, la sécurité au travail, le devoir d'accommodement et les procédures internes de traitement de plaintes.

Pour en savoir plus sur nos services juridiques en français, veuillez consulter notre site web, ou encore, communiquer directement avec :

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Nous anticipons le plaisir de vous servir en français!

WORKPLACE HARASSMENT

Employer held liable despite response that was "beyond reproach".

BY: CATHERINE L. PETERS

A recent decision by the Public Service Grievance Board has been causing a stir in management circles over the past few months. In *Charlton v. Ontario (Ministry of Community Safety and Correctional Services)* (27 June 2007, D. Carter), the grievor was awarded $20,000 in mental distress damages for workplace harassment, despite the fact that the employer's response to the harassment was "beyond reproach".

THE FACTS

About nine months before the grievance, the employer had been managing a situation involving anonymous threatening letters circulating in the Toronto Jail. Ultimately, eight employees who were either Black or members of other racialized groups received anonymous threatening letters.

The employer involved the Toronto police as soon as it became aware of the letters, and the police began an investigation immediately. The police asked the employer not to conduct its own investigation while the police investigation was ongoing, and the employer complied. Although the police ultimately identified several "persons of interest" at the Jail, they were never able to determine who was responsible for the letters.

The grievor, Ms. Charlton, is a Black Canadian woman of African descent, who held a managerial position at the Toronto Jail. On October 3, 2005, while she was on a training course outside the Jail, Ms. Charlton received an anonymous letter at her home that contained racist and threatening language. She reported the incident to the employer and the employer called the police. After receiving the letter, Ms. Charlton did not

return to work and was ultimately awarded WSIB benefits for "mental stress". She was still absent from work and receiving WSIB benefits at the time of the hearing in June 2007.

The *Charlton case* signals that employers are being held to ever higher standards for workplace harassment.

THE GRIEVANCE

Ms. Charlton filed a grievance, and the parties asked the Board to determine what remedy, if any, was appropriate. Although she was a managerial employee not covered by a collective agreement, Ms. Charlton had a limited right to grieve under the *Public Service Act* regarding a "working condition or term of employment".

The Board viewed Ms. Charlton's grievance as a "claim for breach of the contractual guarantee of freedom from racial harassment in the workplace". Although there was no written contractual term, the Board found that such a guarantee was implied under the *Human Rights Code*.

The Board accepted that there had been breach of this implied contractual guarantee – namely, "a vicious and hurtful racial slur that not only affected the grievor's health but also caused substantial injury to the grievor's dignitary interests" – and held that it had jurisdiction to provide Ms. Charlton with a remedy for the injury to her dignity arising from the breach.

Of particular interest, the Board held that it had jurisdiction to award mental distress damages to Ms. Charlton. The Board relied on a 2006 Supreme Court of Canada case, *Fidler v. Sun Life*, for the proposition that the breach of a contract that creates an expectation of a psychological benefit can give rise to mental distress damages without proof of an independent cause of action.

The Board found that the implied contractual guarantee of freedom from harassment created the expectation of a "psychological benefit" akin to the disability insurance contract at issue in *Fidler*. This finding allowed the Board to hold the employer liable to pay mental distress damages to Ms. Charlton, even though the Board also found that "the employer has been beyond reproach in attempting to deal with the problem of workplace racial harassment after it arose". Focusing solely on the "very substantial disruption to the grievor's life and peace

of mind", the Board ordered the employer to pay $20,000 in mental distress damages to Ms. Charlton.

THE PRECEDENT

This is the first case in which an employer whose response to workplace harassment was found to be "beyond reproach" has been held liable for damages. While it has yet to be seen whether other decision-makers will follow the Board's lead, the *Charlton* case signals that employers are being held to ever higher standards for workplace harassment. A proactive response to this issue – designed to prevent harassment rather than react to it when it occurs – is becoming ever more critical if liability is to be avoided.

Many employers have long had proactive strategies in place to deal with workplace harassment (such as anti-discrimination and anti-harassment policies and procedures and associated preventative education programs). However, this development – as well as the risk of increased human rights litigation once Bill 107 comes into effect on June 30, 2008 – highlights the importance of reviewing existing strategies to ensure they are still meeting organizational needs. Your Hicks Morley lawyer would be pleased to help you in reviewing your existing policies and practices for preventing workplace harassment.

Catherine Peters *is a partner in the firm and co-chair of the firm's Knowledge Management Group. Catherine provides strategic advice to clients on a wide variety of areas of practice, with a special emphasis on human rights law, and represents clients before arbitration boards and a variety of administrative tribunals.*

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HR QUICK HITS

New system for human rights complaints

Employers are reminded that on June 30, 2008, Ontario's human rights system will move to a "direct access" model requiring individuals to file complaints directly with the Human Rights Tribunal of Ontario. As a result of the pending changes, employers may see a higher number of complaints proceeding to hearings before the Tribunal. This is a good time to review your outstanding human rights files to ensure you are ready for the new human rights model.

PREVENTING WORKPLACE VIOLENCE

Tragically, at the Hotel-Dieu Hospital in Windsor, on November 12, 2005, a nurse was stabbed to death by an operating room physician, who then killed himself.

BY: SARAH A. EVES & MEGHAN E. FERGUSON

The nurse, Lori Dupont, had attempted to end her relationship with the physician, Dr. Marc Daniel. Both had worked together at the Hospital. This horrific incident once again put the spotlight on workplace violence and the obligations of workplace parties to prevent such violence.

A Coroner's Inquest into the deaths of Ms. Dupont and Dr. Daniel was held in the fall of 2007. On December 11, 2007, the Coroner's Jury came back with 26 recommendations intended to ensure that workplaces design and implement policies to address domestic violence, as well as workplace abuse and harassment, and to provide appropriate training and education.

A LEGISLATED SOLUTION IN ONTARIO?

One of the key recommendations of the Coroner's Jury was for the Ontario Ministry of Labour to review the *Occupational Health and Safety Act* ("OHSA") to consider whether domestic violence from someone in the workplace, or workplace abuse or harassment, warrants legislative or other action to protect workers. The Jury recommended that emotional and psychological harm be included in that review.

There are certainly precedents for such legislation in other jurisdictions. British Columbia, Alberta, Manitoba, Prince

Edward Island, Saskatchewan, and Nova Scotia have recently enacted specific workplace violence regulations under their respective occupational health and safety statutes. Quebec has specific legislation to address psychological harassment in the workplace.

On December 15, 2007, the federal government proposed new "Violence in the Work Place" provisions to be added to the *Occupational Health and Safety Regulation*, which is made under the *Canada Labour Code*. The proposed provisions would require that federally regulated employers develop a workplace violence prevention policy, conduct hazard assessments, provide hazard controls and train employees on violence prevention. It would also require employers to investigate acts of violence and keep records of their investigations. Consultation on the proposed changes ends February 28, 2008.

It is prudent for any employer to develop a policy on workplace violence.

GENERAL DUTIES IN ONTARIO FOR WORKER SAFETY

While there is currently no specific legislation addressing workplace violence in Ontario, the Ministry of Labour takes the position that health and safety inspectors can order policies, programs and controls to address workplace violence under s.25(2)(h) of Ontario's *Occupational Health and Safety Act*. Section 25(2)(h) of OHSA provides that an employer shall "take every precaution reasonable in the circumstances for the protection of a worker".

Ontario hospitals have an additional obligation under OHSA's "Health Care and Residential Facilities" regulations to develop, in consultation with the joint health and safety committee, measures and procedures that address safe working conditions for the safety of their workers.

In addition, the Ministry of Labour published a Guideline on workplace violence in October 2006. The Guideline defines "workplace violence" as:

> ...the attempted or actual exercise of any intentional physical force that causes or may cause physical injury to a worker. It also includes any threats which give a worker reasonable grounds to believe he or she is at risk of physical injury.

The Ministry of Labour's definition of workplace violence focuses on physical injury. Harassment is not included in this definition.

YOUR OBLIGATION AS AN EMPLOYER

Depending upon the magnitude of risk of violence and its frequency, you may be required to implement more than just a policy in your workplace; you may also be required to develop a workplace violence prevention program.

In *Skyjack Inc. (c.o.b. as Linamar Corporation) v. Ministry of Labour*, 2007 CanLII 118 (ON L.R.B.), the Ministry of Labour took the position that Skyjack needed a workplace violence prevention program (i.e. environmental design and controls, emergency response plan, training) in addition to the workplace harassment and violence policies that Skyjack already had in place.

Skyjack appealed the Order to the Ontario Labour Relations Board. Skyjack requested that the Order be suspended pending appeal. In granting the suspension, the Labour Board commented as follows:

> Section 25(2)(h) of the Act does not itself mandate an employer to take any particular precautions. Rather, it requires an assessment of what precautions are reasonable in the specific circumstances of the particular workplace.

Hence, while it is clear that Ontario employers have a positive obligation under OHSA to assess what reasonable precautions they must put in place to prevent workplace violence, the extent of that obligation, and what is "reasonable", depend on your workplace.

PREVENTING VIOLENCE IN THE WORKPLACE

Although currently there is no law in Ontario that specifies what measures are required to address workplace violence, it is prudent for any employer to develop a policy on workplace violence, taking into account the specific circumstances of the workplace. As part of a workplace violence prevention assessment, employers should:

- assess the risk of violence in their workplace;
- develop specific policies and procedures to address potentially violent situations;
- determine if added security or increased security measures are needed;
- ensure human resource staff, managers and supervisors are appropriately trained to handle incidents of violence, including proper investigation techniques;
- consider providing training as needed to workers; and
- monitor, manage and document incidents of violence.

Your Hicks Morley lawyer would be pleased to help you develop a workplace violence policy or program that is tailored to your needs.

Sarah Eves *is a partner in the firm and chair of the firm's Social Services Practice Group. A substantial part of Sarah's practice is dedicated to providing advice and advocacy to public hospitals and other employer clients in the health care and social services sectors.*

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WATERLOO CALLING

Brent Labord articled with Hicks Morley and was called to the Bar in 1987. After two years in Toronto, he moved west to the Municipality of Waterloo to set up a regional office for the firm. Nineteen years later, he's never looked back. Brent talked to *FTR Quarterly* about the genesis of his interest in labour and employment law and his role in setting up Hicks Morley's first regional office.

Where are you from originally?

I was raised in St. Thomas and went to high school there, then did both my undergrad studies and law degree at the University of Western Ontario. So all of my early years were in the south-west. I graduated from Western in 1985.

Where did your interest in labour and employment law come from?

It really started while I was in high school. Each summer I worked at a different manufacturing job, from steel grinder to auto assembly line worker. They were all unionized shops and I was really fascinated by the different dynamics that existed at each workplace between the employees and management. No two were alike.

My interest must have been pretty deep, because when I took my first labour law course in second year, I ended up top of class. That was pretty encouraging, and I took on as much labour study as I could in my final year of law school.

And that led you to Toronto to article?

At that time, if you wanted to specialize in labour law in Ontario, Toronto was the only place to go. Even though Hicks Morley was smaller back then, it was still the leader in its field, and that's what drew me to the firm.

How did your move to Waterloo come about at such an early stage of your career?

It was really just timing. I was already living west of Toronto, in Mississauga and then Burlington. After two years of driving between cities, I was certainly finding the commute a bit of a strain. The firm had begun exploring the possibility of setting up a regional office to bring us physically closer to our client base west of Toronto. I had spent my whole life living in that area, so it was a good fit for me personally and I jumped at the chance to go.

What was the rationale behind regional offices?

The firm's thinking was that if clients had full services within their own community, and those services met Hicks Morley's high standards, then many clients would like the convenience of dealing locally with a regional office rather than the Toronto office. And the hope was that it would also attract new clients who could benefit from access to full-service local legal expertise. And it's worked out very well. We've grown to nine lawyers in Waterloo and there are now three other regional offices in London, Kingston, and Ottawa.

Any challenges?

There were definitely some challenges in the early years. This was all before email and the internet, so I wasn't even linked by computer to the Toronto office. That meant driving into Toronto to do my legal research before arbitrations. It was a long way to go to the library!

But I also had a lot of support. Tom Storie, one of the firm's founding partners, was extremely helpful in introducing me to clients and potential clients in the community. And I had moved to Waterloo and was getting involved in different organizations, like the Grand Valley Human Resources Professional Association. So our presence in the Waterloo region began to grow.

Do you think technology has lessened the need for regional offices?

Not at all. Technology has actually helped by connecting our firm's resources more easily. And in terms of our clients, face-to-face meetings are still an essential part of what we do, so being close geographically is a huge advantage. It also gives us a much better understanding of local business conditions and the local players, whether they're judges, union agents, or other labour partners. We're just more in tune with what's happening.

How has Waterloo changed since you arrived here?

It's certainly grown. Lots of high tech, automotive, insurance, plus the great older family businesses that have been here for generations. Our practice has grown too, of course, just as the firm's overall practice areas have grown. We're not just labour and employment anymore. There's human rights, pay equity, pensions, advocacy and litigation – just about everything in the human resources area. And the Waterloo region is really a fascinating place to do business. You can visit the Perimeter Institute for Theoretical Physics and the Farmer's Market in the same morning. You don't get that kind of diversity everywhere.

How do you unwind outside of the office?

My wife and I have two kids, a son aged 15 and a daughter aged 14, so that keeps us busy. I've always been very sports oriented, and I love watching hockey and baseball. I'm an avid fan of the Kitchener Rangers hockey club. But more recently, my wife and I have taken up motorcycling again. She's got her Harley, and I've got my Victory Arlen Ness Signature Series bike. It's easy to get on the quieter roads around here, and it's a great area of the province to explore. I wouldn't want to be anywhere else.

HR QUICK HITS

Minimum wage

Effective March 31, 2008, the general minimum wage in Ontario will increase from the current hourly rate of $8.00 to $8.75. Special minimum wage rates will also increase proportionately.

Wage earner protection

On December 14, 2007, the federal government passed wage earner protection legislation to protect employees' wages and pensions in the event of bankruptcy. The legislation will amend the *Wage Earner Protection Program Act*, which was originally passed in 2005, but has not yet been brought into force.

HICKS MORLEY WELCOMES NEW ASSOCIATE TO OUR PENSION AND BENEFITS GROUP

SHELBY L. ANDERSON

Shelby Anderson joined our Pension and Benefits Practice Group in January 2008. Prior to joining the firm, Shelby worked as a tax associate at a large national law firm. Shelby received her LL.B. from the University of Western Ontario where she completed a specialization in tax law and she received her B.A. from the University of Calgary. Shelby provides an array of assistance to both private and public sector employers and advises clients regarding plan interpretation and administration, statutory compliance, and member communications. Shelby also assists clients with reviewing and drafting contracts and in pension and benefits related litigation.

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