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LAW AND ADVOCACY

In this issue:

MUNICIPAL MIRACLES—DOING MORE WITH LESS

The call is out for greater efficiencies in the municipal sector – but with it comes a host of other challenges, from developing performance management programs to negotiating affordable collective agreements to handling internal and external human rights complaints. Careful planning has always been beneficial – now it's needed more than ever.

If timing truly is everything, then these could be challenging times for Ontario municipalities. With the recent recession limiting revenues and increasing the demand for municipal services – and with cost-cutting councils now in place in many jurisdictions – the pressures to do more with less will be very challenging. And the need for strategic advice in balancing these interests is critical.

"Many municipalities may have been perceived to have been immune to the global economic crisis that impacted private sector businesses and most others in the broader public service," says John Saunders, a Hicks Morley partner in the Toronto office. "I think we'll see municipalities continuing to focus on fiscal responsibility in the next three years – and this will undoubtedly lead to challenges in their relationships with their unions and employees."

NEGOTIATIONS – A KEY FOCUS

With salaries such a large part of municipal budgets, negotiations with unions, associations and employees will play a key role in the outcome of any cost containment measures.

"Unions and associations are becoming much more provincially focused in their decision-making," says Saunders. "They'll often target municipalities that they perceive to have sympathetic councils first to obtain a monetary breakthrough – then use that success to duplicate the same result in other municipalities."

Mark Mason, Chair of the Hicks Morley Municipal Law Practice Group, says it's a strategy that can lead to wage escalation that few municipalities can afford – and municipalities need to keep the bigger picture in mind.

"We really have an unsurpassed knowledge of the municipal sector as a whole, so we can use that knowledge to benefit all of our clients. In many cases we can advise our clients what is on the horizon and work with them to prepare before an issue arises."

"One of the key advantages we have is that we have the largest municipal sector labour and employment law practice in Ontario and we represent municipalities of all sizes – so we have a unique ability to tell our clients what's happening elsewhere," says Mason. "We really have an unsurpassed knowledge of the municipal sector as a whole, so we can use that knowledge to benefit all of our clients. In many cases we can advise our clients what is on the horizon and work with them to prepare before an issue arises – we work to provide a solution to their problem before they know that they have a problem."

The firm's institutional knowledge goes beyond just wage and salary negotiations to just about any issue a municipality might face.

"Municipalities often take great comfort in discovering that they aren't the only jurisdiction dealing with a difficult issue – and typically, if an issue comes up, we've dealt with it somewhere else," says Michael Kennedy, a partner in the firm's Toronto office.

"It's a true knowledge dividend and we nurture it by maintaining the largest database of municipal legal opinions, rights and interest awards, interest arbitration briefs and collective agreements anywhere. It can provide a huge advantage to our clients."

THE CHALLENGE FROM WITHIN

One of the issues that municipalities are seeing a lot more of as a result of striving for greater efficiencies is human rights complaints from their own staff.

"The current economic climate is creating more and more pressure for municipalities to cut costs while still maintaining or even improving service levels," says Charles Hofley, a partner in the Hicks Morley Ottawa office. "This drives municipalities to increase their performance management activities – and often leads to allegations of harassment, constructive dismissal and discrimination. If these are proven, the damage awards can be extremely costly."

This doesn't mean municipalities should abandon their attempts to more efficiently manage their resources. Rather, they need to develop programs relating to performance management, absenteeism, and sickness and disability management with an

awareness of the potential human rights issues that could emerge.

"These programs are becoming increasingly important tools for clients who are looking to operate with greater efficiency," says Hofley. "The value we bring is in helping them design and implement programs practically and effectively – without creating issues in other areas."

SERVICE-BASED COMPLAINTS

Another emerging challenge for municipalities in an era of cost-cutting is dealing with service-based complaints. Service-based complaints are those brought by citizens claiming that the services municipalities provide are not accessible – or are provided in a discriminatory fashion.

"An example of this is the complaints we're seeing relating to how the disabled are served by public transit," says Amanda Hunter, a partner in the Hicks Morley Toronto office. "These types of complaints rarely existed a few years ago – and now they're a firmly established part of the legal landscape."

Making sure employees are aware of this growing issue is step one in terms of minimizing the risk to municipalities.

"Municipalities should ensure they deliver proper training for those providing services to the public – including an understanding of the types of things that are required under the *Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act*," says Hunter. "Another proactive step is reviewing their current policies and procedures in dealing with service-related issues, including accommodations that can be put in place where necessary. These should then be updated as needed and communicated to employees on a regular basis."

THE NEW MUNICIPAL FRONTIER

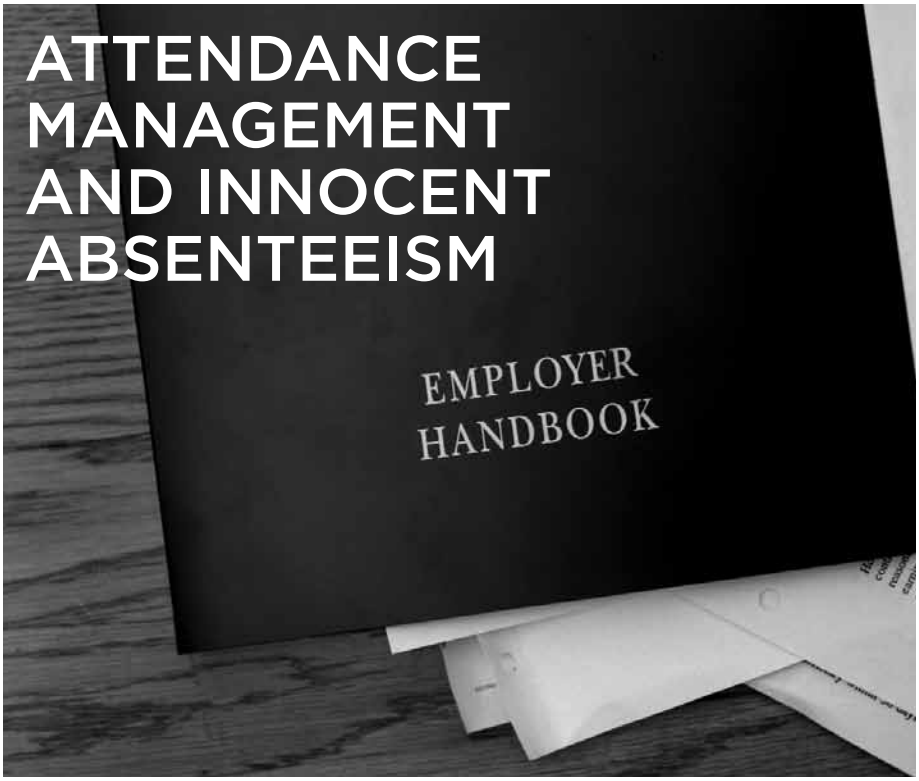
With a squeeze on financial resources and a changing political climate, many municipalities will be heading into uncharted waters when meeting the challenges that lie ahead. And with a growing public relations influence exerted by public sector unions and associations, the challenges will be as much political as fiscal.

"We know that the advice we give and the solutions we propose have to make strategic sense from both a human resources and a political standpoint," says Mark Mason. "In the municipal sector, constituents, ratepayer associations, interest groups, the general public and the media are not only watching but often expect immediate responses to issues or concerns. So the advice we give and solutions we propose always have a strong sensitivity to this environment."

"Municipalities should ensure they deliver proper training for those providing services to the public – including an understanding of the types of things that are required under the *Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act*."

With all of the challenges on the horizon for municipalities, preparation is key – and the planning and proactive actions that they take today will play a significant role in their success in meeting these challenges in the months ahead.

ATTENDANCE MANAGEMENT AND INNOCENT ABSENTEEISM



While every innocent absenteeism case is unique, there are some guiding principles that can help employers determine when, and how, the employment relationship can be brought to an end as a result of innocent absenteeism – that is, absenteeism that's beyond an employee's control.

BY: WILLIAM M. LEMAY

A key starting point is having an attendance management system that is applied consistently and fairly to employees, that is communicated to (and clearly understood by) employees, and that complies with the law. One of the most complicated issues in the area of attendance management is how an employee progresses through the stages of an attendance management system.

In other words, what absences count towards progression through an attendance management system – and what absences do not count.

There have been a number of recent cases that illustrate the issues that arise when determining which absences should be counted for absenteeism purposes. From these cases, we can extract some other principles that will assist in managing innocent absenteeism cases.

The first decision is *Coast Mountain Bus Company*, which is a decision of the British Columbia Court of Appeal. Coast Mountain is a government-owned company that provides bus services in the Greater Vancouver area. As a result of an Auditor General review of its operations, concerns were raised about the absenteeism levels of Coast Mountain employees. To combat this high absenteeism, an attendance management program was introduced.

It was challenged at the B.C. Human Rights Tribunal and ultimately wound up in the B.C. Court of Appeal. The key provision under challenge was the provision of the policy that allowed the employer to count absences that employees took as a result of a disability as defined in the *Human Rights Code*, but without considering whether the policy's trigger points (the number of absences that caused an employee to move to the next level of the program) should be adjusted as part of the duty to accommodate. Ultimately, the B.C. Court of Appeal found that this aspect of the policy was contrary to the *Code* because it discriminated against those who were disabled. Specifically, the Court found that employees who were absent as a result of a disability would generally progress through the attendance management program faster than employees without disabilities.

Ontario arbitrators have adopted this approach in a number of cases. Perhaps the most significant recent decision is *Re Ottawa (City) v. Ottawa Carleton Public Employees Union Local 503*. In that decision, Arbitrator Pamela Picher held that absences on account of a disability, as defined in the Ontario *Human Rights Code*, could not be included in the days counted for attendance management purposes *even if the employer (or the employee) did not know that the employee had a disability*. While this latter proposition may not represent the views of all decision-makers, it illustrates the need to carefully consider the cause of an employee's absenteeism, and to be prepared to respond in an appropriate manner.

The recent decisions serve to illustrate two key concerns that must be addressed before considering whether to terminate someone's employment for innocent absenteeism.

First, does that person have a disability? An employer should be considering that question early on in the attendance management process. If an employee **does** have a disability, then the employer should consider dealing with his or her case through separate policies or processes that address accommodation and return to work issues.

First, does that person have a disability? An employer should be considering that question early on in the attendance management process.

At the very least, an attendance management program should have a mechanism built in that lets the employer determine whether an underlying disability is contributing to the absenteeism. Thus, the employer should be asking the employee whether he or she has an underlying condition that is contributing to the absenteeism. If the employee identifies a potential disability, the employer should take appropriate steps to confirm that the employee does, in fact, have a disability, and then place him or her into the appropriate policy stream.

If the employee does not identify an underlying condition, this should be documented in writing to the employee.

This process should be repeated at every stage of the attendance management program.

Second, has the employer taken all of the necessary steps to support a decision to terminate employment?

Taking these steps adds to the employer's workload up front. However, they offer the employer valuable protection if the employee self-identifies as having a disability at or after the time the employer terminates his or her employment. These inquiries will ensure that there are no misunderstandings – and will also help demonstrate that the employer was managing the attendance management process in a good-faith way.

Second, has the employer taken all of the necessary steps to support a decision to terminate employment?
This is a much harder question to answer as it will depend on the unique facts of each individual case. Matters that you need to consider in order to answer this question include:

1. Whether the employee's attendance record is objectively excessive. Merely being above the "plant average" may not be sufficient for the attendance record to be objectively excessive.
2. What is the prognosis for improved attendance? In other words, does the employee have past history (such as personal problems that have resolved themselves) that suggests that his or her attendance record will improve in the future?
3. Was the employee counselled that his or her attendance was a problem and that it could result in the termination of his or her employment?
4. Where there is an underlying disability contributing to the absenteeism, has the employee been accommodated to the point of undue hardship?

The answers to all of these questions will be important in determining whether it is appropriate to terminate an employee's employment on account of innocent absenteeism. It is vital, however, to remember that each case will be unique and that you have to consider the individual facts before making the termination decision.

William LeMay *is a partner in our Toronto office and Chair of the Workplace Health, Safety and Attendance Management Group. He advises a wide variety of public and private sector employees on general labour and employment matters, as well as issues associated with the accommodation of disabilities and attendance management issues. He was recently selected by Lexpert as one of Canada's Leading Lawyers under 40.*

CHILD-RELATED RESPONSIBILITIES AND FAMILY STATUS PROTECTION

For decades, Canadian human rights legislation, both federally and in most provinces, has included "family status" as a prohibited ground of discrimination.

BY: LEANNE N. FISHER

There have been relatively few employment-related human rights complaints based on this ground and, consequently, relatively little jurisprudence interpreting its scope. As a result, employers across Canada continue to grapple with this area of the law and the extent to which family status protection extends into the workplace. One area of particular challenge that is increasingly arising is the extent to which an employee's child-related responsibilities should attract the family status protection.

UNDERSTANDING FAMILY STATUS

Employees are now, more and more, relying on family status protections to ground requests to accommodate child care needs – whether that means adjusting work schedules, excusing absenteeism or even making relocation decisions based on an employee's child care responsibilities. These requests have stretched the traditional boundaries of the family status protections and have been met with a mixed reception, depending on the forum in which they have been advanced and the circumstances involved. The jurisprudence in this area has generally evolved along two distinct lines of analysis.

THE *BROWN* REASONING

The first line of analysis is based on *Brown v. Canada* (*Department of National Revenue–Customs and Excise* [*"Brown"*]). There, the Canadian Human Rights Tribunal found that an employee had been discriminated against on the basis of family status when her employer resisted her request to work straight day shifts (as opposed to rotating/night shifts) in order to facilitate child care arrangements.

Notably, the Tribunal took a very broad approach to the recognition of family status discrimination and did not require that anything extraordinary be present in the employee's child care/work conflict to give rise to the employer's duty.

This broad analysis has since found strong support in the federal jurisdiction. For instance, in 2006, the Canadian Human Rights Tribunal in *Hoyt v. Canadian National Railway* [*"Hoyt"*] expressly followed *Brown* in finding that CNR had discriminated against Ms. Hoyt after denying her shift-related changes to accommodate her child care needs.

The Tribunal then followed *Hoyt* in the 2010 case of *Johnstone v. Canada (Border Services Agency)* [*"Johnstone"*] when it found that the CBSA had discriminated against Ms. Johnstone, a customs agent at Pearson International Airport, after granting her request for a static day shift but then, as a result, placing her in "part-time" employment status (34 as opposed to 37.5 hours per week).

Most recently, in September of 2010, the Canadian Human Rights Tribunal again expressly endorsed and applied this broad approach in a trilogy of cases (*Seeley v. CNR*, *Richards v. CNR* and *Whyte v. CNR*). In each of the three cases, the Tribunal found that the applicable employee had been discriminated against on the basis of family status when, as a result of her parental responsibilities, she refused a mandatory transfer to another province and was terminated as a result.

THE *CAMPBELL RIVER* REASONING

To date, adjudicators outside the federal jurisdiction (i.e. labour arbitrators and human rights tribunals under provincial jurisdiction) have been influenced by a second, narrower interpretation of "family status"–one that was established in a 2004 British Columbia Court of Appeal case called *Health Sciences Assn. of British Columbia v. Campbell River and North Island Transition Society* [*"Campbell River"*].

In *Campbell River*, the Court set out that, to establish a case of family status discrimination based on parental responsibilities, the employee would have to prove:

a) an employer-initiated change to his/her terms of conditions of employment; and

b) that this change resulted in a substantial interference with the employee's child care responsibilities.

The employee involved in *Campbell River* was able to meet these requirements on the facts as:

a) the employer had changed her end time each day from 3:00 p.m. to 6:00 p.m., which meant she could no longer care for her child after school; and

b) this change resulted in a "substantial interference" with her child care duties since her child suffered from behavioural challenges that, according to the child's psychologist, specifically mandated his mother's daily after-school care and attention.

This more stringent *Campbell River* test does, however, seem to be softening in many jurisdictions. For instance, some adjudicators have not required that a work-based change be at the root of the home/work conflict (recognizing that home-based changes such as a divorce or custody changes could give rise to the conflict). Likewise, the "substantial interference" test appears to be giving way to a "something more" test (i.e. something beyond a standard child care/work demand clash is required to engage family status protection).

The precise circumstances that will satisfy this "something more" test have been unpredictable and highly influenced by the particular facts of each case. Child custody arrangements, a spouse's complicated pregnancy, a child's premature birth or a child's behavioural issues have warranted protection in some instances. Conversely, employee requests arising from more typical situations have in many cases failed to attract the protection.

GOING FORWARD

With an aging population and eldercare issues on the rise, employers can anticipate the challenges presented by family status to continue.

The "substantial interference" test appears to be giving way to a "something more" test (i.e. something beyond a standard child care/work demand clash is required to engage family status protection).

As the law evolves in this area, prudent employers faced with employees alleging a conflict between workplace and family-related obligations should seek additional information about the employee's particular challenges, any triggering event and the efforts that the employee has made to address them. With this information in hand, they will be better positioned to assess the scope of their obligations.

Leanne Fisher *advises and represents clients on a wide range of employment and labour-related matters across all sectors, with a particular emphasis on human rights issues. Leanne works out of the Ottawa office.*

FROM FARM TO FIRM

With first-hand knowledge of rural life, extensive work periods in the automotive and education sectors and a life of experiences in southern and southwestern Ontario, few lawyers are better positioned to serve clients in the region than Marg Szilassy. Working out of the firm's London office, Marg's practice includes all aspects of labour and employment law, with a particular emphasis on occupational health and safety and human rights. She spoke with *FTR Quarterly* in December about the evolution of her practice and some of the trends she sees in employment law.

Are you from the London area originally?

I grew up on a 200-acre dairy farm in Grey County and went to high school in Hanover. The Grade 11 career counselling process at school was the first time that I consciously thought of law as a possible career.

After high school I went to the University of Waterloo and took a mix of arts and business courses in the Applied Studies program. This was a co-op program and General Motors of Canada Limited in Oshawa was the company I worked for during most of my four-month work terms.

I worked in the divisional personnel department at GM, and when I graduated in 1984 I went to work for them full-time.

But a career in law was still calling.

Yes, it was. I decided to take an education leave in 1986 to go to law school at Western, but I continued working at GM in the summer doing government relations and labour relations. So I worked at GM through most of the 1980s and had a great experience. It gave me invaluable exposure to the industrial and automotive sectors – and experience with HR issues as well.

When it came time to article in 1989, I went to Lerners in London and was hired back after my call to the bar in 1991 to do mostly criminal law, which I enjoyed tremendously. I was in court most days. It was very demanding and very unpredictable but also very exciting.

In the end, though, the demands of a criminal defence practice led me to look for a change, so I left Lerners in March 1995 and joined the Perth County Board of Education in Stratford as the Administrator of Human Resources and Legal Counsel.

How did you arrive at Hicks Morley?

Hicks Morley was the outside counsel to the Board on HR issues, so I got to know the firm well during my time there. The firm was looking for another lawyer for its London office at the time the school boards were restructuring in 1998. The restructuring would have required me to relocate, and the position at Hicks offered the opportunity to get back into litigation, which I missed, so I decided to make the move to Hicks – and I've been here almost 13 years now.

Has your past experience helped you in your work at the firm?

Absolutely. In the past, I worked through many of the issues that manufacturers and school boards faced from the inside, so I know the pressures and concerns first hand. And that's been invaluable in helping me develop solutions that satisfy both the legal and business or operational concerns.

And my criminal law background has helped me in areas like occupational health and safety, where employers may face *quasi*-criminal proceedings under the *Occupational Health and Safety Act* for alleged violations.

What about the London office – any change since you started?

We're five lawyers now instead of three and the firm as a whole has more than doubled in size since I started. But that really hasn't changed who we are or how we service clients. In fact, as a regional office, it's easier than ever to access the greater firm knowledge – the electronic resources are incredible. Our Knowledge Management Group keeps everyone in the loop.

I also think our clients appreciate the fact that we have experts in every specialty area – from pensions to construction to pay equity – and that we can access those resources at a moment's notice, no matter where the client is located.

Any issues of note in the region you serve?

Our region faces the same HR issues as any other, but the southwest was hit particularly hard in the recent recession with the near collapse of the auto sector. So working through that process with my clients was challenging. I'm hopeful that the worst is over now and the economy in this area is improving.

> It's during the tough times that you realize how much you value the client relationships that you have. You go through a lot together and you learn a lot together.

And it's during the tough times that you realize how much you value the client relationships that you have. You go through a lot together and you learn a lot together. I've been lucky to work with some wonderful clients who've become friends over the years. I wouldn't trade it for anything.

Any trends in particular that employers should watch out for?

A definite trend is the aging workforce and the issues that stem from that. A big one will be providing reasonable accommodation in the workplace on the basis of age.

The other trend of note is the changing nature of the way violence in the workplace is handled. Under the recent amendments to the *Occupational Health and Safety Act* – Bill 168 – employers need to have workplace violence

prevention policies in place and be able to demonstrate that they've done risk assessments in critical areas.

Its enactment also sends a strong signal to employers that incidents of workplace violence are inexcusable and warrant a significant response from employers in terms of the discipline imposed.

What keeps you busy outside of the office?

We bought the farm where we live in 2000, so I've really come full circle in terms of farm life – and we love it. It's just north of London, so it's not far from the office. We have two daughters, ages 13 and 14, and we have horses on the farm, so we all ride. We grow hay as well. In the winter, we cross-country ski, although we've had so much snow lately it's been hard to create the trails. So with all of that, plus our daughters' activities and getting together with friends, family life is full!

HR QUICK HITS

WSIB Funding Review of Unfunded Liability May Spell Increase in Employers' Premiums

As announced on our Human Resources Legislative Update blog in the fall of 2010, the Ontario government announced that Harry Arthurs would chair a year-long funding review of the unfunded liability of the Workplace Safety and Insurance Board. That review is underway. A number of select stakeholders and actuarial, financial and group insurance experts are participating in the initial stages of consultation.

The Board has further announced that plans to eliminate its unfunded liability will include an average increase of employer premiums of approximately 2% for both 2011 and 2012. If you have questions about the unfunded liability consultation process or the impact it may have on your organization, please contact Jason Mandlowitz or your regular Hicks Morley lawyer.

NEW PARTNER

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

FRANK CESARIO

Frank practises in the firm's Litigation Group. He has practical and courtroom experience representing private and public sector clients in civil litigation and regulatory proceedings. Frank has particular expertise in administrative law and judicial review proceedings, restrictive covenant litigation, shareholder litigation, employment litigation, class actions, and injunction proceedings. Frank has represented clients in trials, commercial arbitrations, hearings, mediations and appeals. He has appeared as counsel before administrative tribunals, in all levels of court in Ontario, in the Federal Court of Appeal and in the Supreme Court of Canada. Prior to commencing practice Frank clerked at the Court of Appeal for Ontario. He joined the firm in 2008 as an associate.

HICKS MORLEY WELCOMES A NEW ASSOCIATE TO OUR PENSION AND BENEFITS GROUP

SUSIE TAING

Susie Taing is an associate in the Hicks Morley Pension and Benefits Group. Susie advises employers on various aspects of pension plans, including plan design, administration and governance, as well as legal issues relating to plan mergers, wind-ups, surplus and corporate transactions. Susie obtained her LL.B. from the University of Ottawa, where she co-chaired the Employment and Labour Law Students' Society in 2006/2007 and 2007/2008. Prior to law school, she graduated with a Bachelor of Commerce, *magna cum laude*, at the University of Ottawa and a Master of Industrial Relations at Queen's University. Before joining Hicks Morley, Susie was a pension and benefits lawyer at an international consulting firm in Toronto and articled with a management-side labour and employment law firm in Ottawa.

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