FTR QUARTERLY

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Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

In this issue:

BOUNDARIES EXPANDING ON OCCUPATIONAL HEALTH AND SAFETY

Workplace health and safety has long been a focus in the industrial and manufacturing sectors, with products, equipment and manufacturing processes that carry higher risks of a serious or fatal accident occurring.

But with the steady decline in the manufacturing sector in Ontario, one would expect a corresponding decline in occupational health and safety audits and prosecutions.

"It hasn't happened," says Ian Campbell, a partner in Hicks Morley's Waterloo office. "The ongoing trend of a stringent and rigid enforcement of the *Occupational Health and Safety Act* [the "*Act*"] initiated by the provincial government has continued, with more and more employers being charged for what in the past would have been minor violations that were addressed by orders."

Scott Thompson, a partner in Hicks Morley's Toronto office, agrees. "There's a much more focused approach to health and safety by the Ministry of Labour across all sectors of the economy," he says. "We now have fewer and fewer manufacturers, so the Ministry is looking at other settings, like offices and institutions."

EXPANDED HORIZONS

As the Ministry steps up its audits in sectors such as education and healthcare, Ministry officers appear to be applying a standard of near perfection for compliance with the *Act*.

"The prosecutions often involve more minor issues – like slips and falls, reporting of occupational diseases and the storage of oxygen tanks," says Robert Little, a partner in Hicks Morley's Toronto office. "These are issues that might have been overlooked in a manufacturing environment, but the Ministry seems to want to impress upon these sectors that it means business."

In addition to this more stringent enforcement, the scope of health and safety in general has expanded.

> There's a much more focused approach to health and safety by the Ministry of Labour across all sectors of the economy.

"I receive a lot of questions relating to workplace violence, since that is now covered under the *Act* and is considered a health and safety issue," says Nadine Zacks, an associate in the Hicks Morley Toronto office. "And reporting obligations in general are increasing. A recent decision involving Blue Mountain Resorts Limited extended the reporting of critical injuries or fatalities to resort guests, not just workers. While the case has been appealed, it's a clear indication of the move to expand employer obligations under the *Act*."

REASONABLE PROTECTION ONLY

One bright light for employers in the workplace safety area is the recent Ontario Court of Appeal decision involving Sheehan's Truck Centre Inc. The case involved the need for certain vehicles to be guided by a signaller, and in deciding in favour of the employer, the Court stressed that the *Act* is meant to provide reasonable protection to workers and not to seek the impossible – an entirely risk-free work environment.

"This is a significant finding, with an appellate court acknowledging that the *Act*'s purpose is to ensure reasonable protection and not eliminate all risks," say Dan Michaluk, a partner in Hicks Morley's Toronto office, who argued the case for the employer. "The Court also awarded costs against the Crown, as we had argued that it was difficult for smaller

employers to justify taking on the Ministry on a significant point of interpretation given the legal costs. It's an important finding for employers as taking a case through several levels of court proceedings can often exceed the cost of the fine – and the awarding of costs provides some relief."

> Spend more time training and retraining employees, even on the basics. Carry out frequent and intensive workplace inspections. Consider an inspection and audit by independent health and safety professionals. Document all of your due diligence efforts.

TAKE ACTION

In this era of heightened scrutiny, and with more of a shift in responsibilities towards employers and away from individual employees, proactive action is more important than ever. There are a number of steps that employers can take to minimize occupational health and safety issues.

"I think employers should focus on four things to minimize their health and safety risks," says Campbell.

"First, spend more time training and retraining employees, even on the basics; second, carry out frequent and intensive workplace inspections; third, consider an inspection and audit by independent health and safety professionals; and finally, be sure to document all of your due diligence efforts."

Another important part of the due diligence process is investigating any near misses that occur in the workplace.

"Investigating near misses – where safety lapses occur or an accident is narrowly prevented – can be a huge help in identifying gaps in your health and safety program," says Thompson. "Addressing these gaps can help clients avoid significant problems later."

In the end, minimizing occupational health and safety risks is all about staying on top of changing times.

"Clients need to regularly re-evaluate their systems and processes," says Little. "Systems that were acceptable 20 years ago may not be considered acceptable now. We can help them find the reasonable middle ground in terms of what's required."

THE CHALLENGES OF ACCOMMODATING ENVIRONMENTAL SENSITIVITIES IN THE WORKPLACE

Most employers are well versed in their obligation under human rights legislation to accommodate employees with disabilities. The key issue is most often related to finding an appropriate accommodation in an individual case. In recent years, employers have faced increasing accommodation requests based on environmental sensitivities. Such requests present several unique challenges for employers and two recent arbitration awards provide some guidance.

BY: KEES KORT AND COLIN YOUNGMAN

ENVIRONMENTAL SENSITIVITIES EXPLAINED

People with environmental sensitivities experience symptoms that are attributed to exposure to chemicals often found in everyday products, such as cleaning and grooming aids.

Accommodating employees with environmental sensitivities is unique, in that traditional accommodations such as modifying job duties will, in many cases, not provide a solution, and employers may be required to consider modifications to the workplace as a whole. There are further accommodation challenges when an

employee with environmental sensitivities works in an atmosphere that is difficult to control, such as a workplace and job that serves the public.

As with any request for accommodation, it is important for employers to obtain:

- current, objective medical information that establishes a disability;
- the medical restrictions required to be accommodated; and
- the specific chemicals to which an employee has an adverse reaction.

Employees are required to provide this information. The employer must then take steps to protect the affected employee from exposure to the offending chemicals.

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THE "PHYSICAL VERSUS PSYCHOLOGICAL" DEBATE

There is a significant debate within the medical community as to whether environmental sensitivities are physiological in nature and result in a physical disability, in which case, they are generally referred to as Multiple Chemical Sensitivity ("MCS"), or are psychological in nature, in which case they are generally referred to as Ideopathic Environmental Sensitivity ("IES"). While the medical debate is unlikely to be resolved with any certainty, at least at the present time, it is important to understand that regardless of whether the condition is physical or psychological, an employee may still have a disability that requires an accommodation. This was recognized by Arbitrator Knopf in a recent arbitration between the Toronto District School Board ("TDSB") and the Ontario Secondary School Teachers' Federation:

> ...whether [the grievor's] symptoms are "caused" by a physical reaction to scents and chemicals in the workplace or whether her symptoms are the result of a psychological reaction to her fear of toxic chemicals that may or may not be there in any form or quantity that could actually cause her harm, the resulting symptoms are "real." Further, those symptoms are debilitating and prevent her from fulfilling her daily duties as a teacher.

Arbitrator Knopf found that the physical versus psychological debate impacts the employer's ability to accommodate the disability. When the disability is physical in nature an employer may experience greater accommodation success, whereas scent sensitivity that is psychological in nature may be extremely difficult, if not impossible, to accommodate.

A common accommodation for environmental sensitivities often includes implementing a scent-free workplace policy or establishing a scent sensitivity program. For controlled environments with limited public access, enforcement of a scent-free policy may prove relatively easy. However, when the public has access to a workplace, an employer often has minimal ability to enforce its policy.

In the TDSB award, Arbitrator Knopf also recognized that enforcement of a scent-free policy in a workplace may prove problematic when employees deny they are wearing scented products:

> Was he scented or not? How could this possibly be determined? What is the proper protocol when someone denies being scented and someone else says s/he is? Who can/should be designated as "scent-free enforcer"?

Regardless of the challenges involved, employers who receive a request for accommodation of environmental sensitivities must treat the request seriously.

As MCS and IES are "invisible" disabilities and can be very subjective, there may be a tendency to doubt the employee's need for an accommodation. Nonetheless, failure to address the issue gives rise to potential human rights liability.

A COLLABORATIVE APPROACH TO ACCOMMODATION

The employer, the employee and the union, if any, have always been required to work collaboratively in searching for and implementing accommodations. This is particularly so in the accommodation of MCS and IES, which is often dependent on other employees abiding by scent-free workplace policies.

In *Corporation of the City of Quinte West and CUPE*, another recent case from Arbitrator Knopf, the arbitrator specifically recognized the union's obligation to participate in educating bargaining unit employees and ordered the union to meet with bargaining unit members to explain the purpose and importance of compliance with the scent sensitivity program, and to explain the consequences of non-compliance.

Although there are unique aspects, an accommodation request based on MCS or IES is fundamentally the same as all such requests arising out of a disability so, at a minimum, employers should consider the following steps in every case:

- **Get medical information**. The employee must provide the medical information needed to determine whether there is a disability and the medical restrictions that may require accommodation. Given the nature of MCS and IES, employers may need to consider requiring a medical assessment from a specialist.

> While the medical debate is unlikely to be resolved with any certainty, at least at the present time, it is important to understand that regardless of whether the condition is physical or psychological, an employee may still have a disability that requires an accommodation.

- **Determine a reasonable and appropriate accommodation, if any.** The accommodation could be as straightforward as placing standalone air filters near the employee's workspace, designating a scent-free rest room or moving the employee's work location. It could also be as complex as comprehensive air quality testing, cleaning of the entire workplace or the replacement of all cleaning products used in the workplace.
- **Consider the need for a policy.** The employer should consider implementing a scent-free workplace policy – or a workplace scent sensitivity program with appropriate employee education and training.

- **Get the union involved.** In a unionized workplace, the union should be involved in acquainting bargaining unit employees with their responsibilities in maintaining a scent-free workplace.

and situation. An ultimate solution or resolution will depend on the employee, his or her particular medical restrictions, the employee's job and workplace and the workplace environment.

TAKE IT CASE BY CASE

As with all disabilities, each accommodation request will have to be assessed on the facts of the particular circumstances

Kees Kort *is a partner in the firm's Kingston office, and regularly acts as counsel in all manner of employment-related matters in unionized and non-unionized workplaces and collective bargaining, in both the public and private sectors, emphasizing proactive solutions and preventative strategies in his practice.*

Colin Youngman *is an associate in the firm's Kingston office. He advises and represents both unionized and non-unionized employers throughout Eastern Ontario, and is regularly engaged in wrongful dismissal litigation, labour arbitration cases, Ontario Labour Relations Board proceedings and human rights proceedings.*

HR QUICK HITS

Mandatory retirement to end in 2012 for federally regulated employees

On December 15, 2011, Bill C-13, *Keeping Canada's Economy and Jobs Growing Act*, received Royal Assent. In part, the Bill amends the *Canadian Human Rights Act* to eliminate mandatory retirement for federally regulated employees, unless there is a *bona fide* occupational requirement. This is consistent with human rights legislation in Ontario and other provinces, which applies to provincially regulated employees.

The amendments to the *Canadian Human Rights Act* will come into force on December 15, 2012.

ONTARIO WSIB: TACKLING UNFUNDED LIABILITY ISSUES

The Ontario Workplace Safety and Insurance Board ("WSIB") continues to be challenged by unstable economic circumstances. These economic factors, together with benefit entitlements, have resulted in an unfunded liability of $12.1 billion at June 30, 2011. Accordingly, the WSIB has implemented a comprehensive strategy focused on increasing funding, applying more stringent rules related to benefit entitlements, and reducing the duration on benefits through earlier returns to work.

BY: JASON MANDLOWITZ

WSIB ACTION PLAN

The WSIB has taken a number of steps to address the unfunded liability issue. An average 2% increase in premium rates for 2012 has been approved – and the new Second Injury and Enhancement Fund ("SIEF") adjudication team has denied employers cost relief on most claims. In addition, the New Experimental Experience Rating ("NEER") program has been amended so that effective with the 2008 injury year, claims will undergo rebate/surcharge evaluations for four consecutive years, increased from three, which will insure that higher Limited Claim Costs are captured. This action may lower rebates or increase surcharges.

Improvements on the benefit side are due to a reduction in the number of lost time

claims entering the system, the application of more stringent eligibility rules for the 72-month benefit lock-in, and cost mitigation for drugs and other healthcare costs.

The core WSIB strategy for impacting benefits and duration on benefits is to work with the workplace parties to facilitate early and safe return to work. Accordingly, the Board has introduced five new return to work policies, the purpose of which includes ensuring that the worker's dignity and productivity is maintained and the worker has meaningful input and choice.

The implementation of these policies is part of the WSIB's new Service Delivery Model. When a worker is unable to return to work the claim file is referred to a WSIB Case Manager. For the first six months it is managed by a Short Term Case Manager and thereafter by a Long Term Case Manager. These managers establish return to work goals and objectives, apply legislation and WSIB policy, assign WSIB staff and determine whether WSIB services are required.

A Return to Work Specialist may be assigned to the claim to co-ordinate the return to work process. A Work Transition Specialist may be assigned to provide advice, planning and transition services (such as labour market re-entry). Where the WSIB determines that the employer has a negative claims experience, an Employer Liaison Specialist may be assigned to review and assist on improving disability management and return to work programs.

When the WSIB is determining whether pre-accident, comparable or suitable work is available in a unionized environment, the terms of the collective agreement will be respected but the Board may determine there is a need to adapt or modify specific provisions.

Employers should be aware that as early as eight weeks after the workplace injury/illness – and if a return to work has not occurred – the WSIB will make contact and arrange a meeting seeking to have the worker return to work with the pre-accident employer in some capacity and to ensure that legislated co-operation and re-employment obligations are met.

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Co-operation and re-employment obligations will generally be considered to have ended if:

- there is no longer an employment relationship because the worker voluntarily resigned;
- the worker has been terminated for reasons unrelated to injury or because there is no suitable work currently available; or
- the worker will be unable to return to work in any capacity in the reasonably foreseeable future.

If a worker was on a fixed contract and lost time because of a workplace accident, WSIB policy now states that the worker must be re-employed for the remainder of the fixed term that was interrupted.

If the worker was terminated before returning to work, or the worker returned to work and was terminated within six months, the WSIB will now apply the legislative presumption that places the onus on the

employer to demonstrate that the termination was not related to the workplace accident.

Most importantly, WSIB policy specifies significant financial penalties where the workplace parties fail to co-operate with return to work or where the employer breaches its re-employment obligations.

WSIB ASSISTANCE ON RETURN TO WORK ISSUES

One way the WSIB can assist with return to work, even if there is no "issue in dispute," is to provide timely claim file information including some medical findings. The WSIB can provide:

- information on the status of a claim;
- documents from health professionals;
- work transition assessments and plans;
- results of a WSIB claims investigation; and
- medical information (treatment, appointments, prognosis, restrictions, etc.).

It can also confirm or deny employment exposure or the existence of a pre-existing condition. The WSIB recently changed the healthcare provider initial report (Form 8) to include return to work information for certain musculoskeletal injuries that the worker must now provide to the employer as soon as possible following initial medical attention.

Jason Mandlowitz *is Vice-President, Consulting Services at Hicks Morley. He advises private and public sector clients on issues relating to workplace safety and insurance, occupational health and safety, and absence management. This includes reviewing and developing policies and best practices, claims management, financial issues management and preparation for government reviews/audits. Jason also provides education and training for senior executives, managers/supervisors and practitioners on legislation, regulations, WSIB and health and safety programs and employer policies/best practices.*

HR QUICK HITS

Mandatory WSIB coverage for construction industry to commence January 1, 2013

Effective January 1, 2013, mandatory WSIB coverage will be extended, with limited exceptions, to certain employers in the construction industry: (i) independent operators who carry on business in construction; and (ii) sole proprietors and partners in a partnership that carry on business in construction and do not employ any workers.

A free, "voluntary pre-registration" period has now commenced; affected employers may register electronically on the WSIB website. Premiums will not become due until January 1, 2013. Detailed information about the extended coverage has been posted to the WSIB website.

CONTINUING PROFESSIONAL DEVELOPMENT SESSIONS

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

January 25	**Pension and Benefits:** Managing change
February 1	**Employment Standards:** When the past comes back to bite you
February 22	**Human Rights Issues:** Strategic planning for 2012 and beyond
March 7	**Legal Issues in Managing Employee Illness**
March 28	**Emerging Challenges in the University Sector:** Staying a step ahead
April 11	**First Strike:** Taking the initiative in litigation
September 5	***AODA***
September 19	**Privacy**
October 3	**Workplace Harassment**
October 24	**Litigation:** Wrongful Dismissal
November 7	**Workplace Safety and Insurance**
November 21	**Labour Law**

**Accreditation pending, visit hicksmorley.com/advantage for details.*

CLIENT CONFERENCES 2012
ON YOUR MARK

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

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

Waterloo: **April 26**
Toronto: **June 1**
Kingston: **May 17**
London: **June 4**
Ottawa: **May 25**

Visit hicksmorley.com for details.

TOUCHING ALL THE BASES

John Bruce has carved out one of the most diverse law practices at Hicks Morley, and advises and acts for clients in both the private and public sector on issues across the labour and employment law spectrum. He is also deeply involved in choosing future generations of Hicks Morley lawyers as Chair of the firm's Student Committee – a position he's held for the past five years.

John spoke with *FTR Quarterly* in December about his practice and some of the legal trends that are emerging.

Can you tell us a bit about your background?

I was born and raised in Guelph and went to Queen's in Kingston for both my undergrad in political studies and my law degree.

I enjoyed studying politics and actually thought about a career in journalism at one stage. But law won out. I spent some time observing practitioners during law school, and the ones who seemed the happiest with their practice were labour lawyers. And labour had the "people issues" type of practice that seemed to suit me.

By the time I was ready to article, I knew that labour and employment was it, and Hicks Morley was at the top of my list.

Did you have any one area you wanted to focus on when you joined the firm?

No, I really tried to keep my practice as general as possible, and I still do. I discovered early on that what I enjoyed most was building long-term relationships with clients and being the point person for any of the HR law issues that arose. And to do that, I needed to gain – and constantly maintain – experience in a number of different areas.

What do you enjoy about the work itself?

I love the variety – and the fact that every day is different. I could be at a hearing one day, giving strategic advice on a corporate transaction the next, and drafting a complex legal opinion on the third. And every client is different, from steel mills to hospitals to school boards. A key part of serving clients well is learning how their organizations work – and that's something I enjoy immensely.

What does your student committee work involve?

I'm in my fifth year as Chair of the Student Committee and I really enjoy it. It's time intensive but there's just so much energy and enthusiasm in the students we see and ultimately hire. And the students see this reflected in the upbeat nature of the firm and the good sense of humour about the place. I think we're an easy sell to many of the top students because we offer a Bay Street firm practice with a small town firm culture. That was certainly one of the attractions to me in coming here.

Any trends in particular that employers should note?

I think one of the key trends is the increase in the number of constitutional issues that are being raised. There are *Charter* challenges relating to mandatory retirement, attacks on government wage freeze legislation, concerns relating to privacy and freedom of speech – these are all fascinating issues. But there's a cost, too.

In the tribunal work we do on behalf of clients – arbitrations, labour board hearings, human rights cases – we're grappling with more technical legal issues, and the challenge is to still keep these proceedings efficient. It's one of the key strengths of tribunal work – to handle issues quickly and efficiently – so tribunals, along with lawyers and their clients, are trying to strike that balance between dealing with these complex issues, and not bogging down the proceedings so much that it defeats the purpose.

Why is this happening?

I think the areas of law have matured over time and the issues have become more refined. Issues that would never have been seen in an arbitration 20 years ago are now cropping up – torts, human rights, accommodation issues, medical privacy issues, pensions. These can all play a role in a proceeding.

Not that long ago, you used to be able to complete an arbitration in a day. Our clients want us to find ways to deal with matters efficiently, cut to the chase, and get timely and cost-effective results... also, they love to win!

What do you enjoy doing in your downtime?

I did some work in comedy clubs in my younger years, and I really enjoyed that. But I've got a great wife and two wonderful kids now, so the focus has switched to things like camping and hiking and day-to-day family life – all good! And I joined a local theatre group last year to keep my hand in performance. We had a blast putting on a musical to raise money for charity. The theatre group has been a great way to stay connected to our community.

HICKS MORLEY WELCOMES TWO NEW PARTNERS

Hicks Morley is pleased to announce the addition of two new partners into the partnership.

JASON GREEN

Jason is a partner in Hicks Morley's Toronto office. He acts exclusively for employers in the areas of labour relations and employment law, providing effective and practical advice ranging from strategic labour relations planning and collective bargaining to contract interpretation and employee terminations. He represents private and public sector employers as spokesperson in collective bargaining and as counsel, where he appears regularly on behalf of management in a broad range of forums, including arbitrations, human rights proceedings and labour board hearings. Jason also has significant experience representing public sector employers as counsel at interest arbitration and an active litigation practice, with expertise in defending wrongful dismissal and disability claims.

LAURI REESOR

Lauri Reesor is a partner in Hicks Morley's Toronto office and advises a wide variety of both public and private sector clients with respect to labour relations and employment issues. Lauri regularly appears before various administrative tribunals including the Pay Equity Hearings Tribunal and the Human Rights Tribunal of Ontario. In addition, Lauri has a thriving labour arbitration practice. With respect to litigation, Lauri has developed a niche in class action litigation on behalf of employers including claims for unpaid wages, retiree benefits and tort claims. Lauri is a frequent speaker and provides client training on human rights, pay equity, class proceedings and all aspects of the employment relationship.

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