FTR QUARTERLY

WINTER 2013

In this issue:

Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

HARD BARGAINS

The financial market crisis of 2008 – and the world recession that resulted – led to many difficult labour negotiations, as employers struggled to remain viable. Five years on, the impact continues to be felt in a profound way at the bargaining table.

"The economic downturn that started a few years ago continues to have repercussions for bargaining in both the private and public sectors," says Jonathan Maier, an associate in Hicks Morley's Toronto office. "Clients are not only looking to contain and save costs, they're also considering flexible ways to respond to non-monetary issues."

LOOKING BEYOND WAGES

While wage freeze proposals continue to grab headlines, it's the resolution of non-monetary issues that could have an impact for many years in the future.

"Times have changed, and we're seeing a greater willingness for employers to address serious structural issues," says John Saunders, a partner in the firm's Toronto office. "Certainly in the municipal sector, employers are waking up to the economic factors that the private sector has been addressing for the past few years, and that's putting a lot of things on the table, not just wages."

While employers are finding it essential to address issues beyond wages, not everything can necessarily be fixed in one round of bargaining – and tackling too much at once can create its own set of problems.

One of the unique examples of this was the introduction in the education sector of Bill 115, legislation based on a Memorandum of Understanding between just one teachers' union (the Ontario English Catholic Teachers' Association) and the Ministry of Education.

> "Times have changed, and we're seeing a greater willingness for employers to address serious structural issues."

"From the school boards' perspective, Bill 115 was not just about wage restraint," says John-Paul Alexandrowicz, a partner in the Hicks Morley Toronto office. "It also included substantive terms that school boards may have viewed as inconsistent with their mandates to provide the best possible quality of instruction to the students in their schools."

In exchange for the wage freeze and other compensation restrictions, the Memorandum of Understanding offers teachers a seniority-based hiring process and provides teachers – not school boards or principals – with the discretion to choose which, if any, diagnostic tests they will use for their students.

"It is now clear that the government has decided to impose the Memorandum of Understanding (or variations of it) on all school boards and unions and to use regulations to impose additional terms of employment in the sector. Our challenge will be to determine how to administer these collective agreements and terms of employment in circumstances where the school boards were not involved in drafting their terms," says Alexandrowicz.

PRIVATE SECTOR ALSO AFFECTED

Of course, the cost pressures that public sector employers are feeling hit the private sector even earlier, and these pressures have remained.

Private sector employers don't face the same negotiating constraints as many public sector entities that must deal with government intervention (e.g. school boards) or interest arbitration models (e.g. "no strike" essential services). But they face the reality of potential labour disruptions and have to plan accordingly.

"In this environment, many employers know they will have to bargain hard to stay viable, and we're seeing more preparation in relation to possible labour disruptions," say Donna D'Andrea, a Hicks Morley partner who negotiates exclusively in the private sector. "And the preparation is happening at a much earlier stage as clients want to be ready for such an eventuality."

That said, no employer wants a work stoppage, and there are a number of strategies to help avoid one.

"More clients are prepared to meet at the first available opportunity on renewal agreements," says D'Andrea. "The goal is to make best efforts to reach an amicable settlement as early as possible. And clients are aggressively looking for other ways to trim expenses from an operational perspective – to do more with less and relieve some of the cost pressures."

THE DISCLOSURE IMPERATIVE

One of the biggest shifts in strategy in difficult times is the need for much greater and earlier disclosure of the employer's bargaining position.

"One of the most important pieces of strategic advice for employers is to provide

more disclosure earlier in the bargaining process," says Sophia Duguay, a partner in the firm's Kingston office. "More transparency is extremely helpful in managing the expectations of unions and their members."

> "We're really a repository of all of the unwritten information of what is going on in various sectors across the province and across the country."

And in these high-tech times, transparency also extends to social media.

"Social media has fundamentally changed the landscape of collective bargaining," says Craig Rix, a partner in the firm's Toronto office. "Employees want to be in the know and are using things like Facebook to make their views known. This can influence bargaining outcomes."

It means that employers must be ready to communicate strategically to advance their interests inside collective bargaining – and have a dialogue with employees well before bargaining starts.

"An employer trying to make a case for fundamental change at the table – and who only tells that story for the first time once bargaining begins – has a far higher mountain to climb in order to achieve its bargaining objectives," says Rix.

STRATEGIC ADVANTAGE – KNOWLEDGE

Knowledge is an extremely valuable commodity in any negotiation situation, and it's a key area in which Hicks Morley can help.

"We're really a repository of all of the unwritten information of what is going on in various sectors across the province and across the country," say Saunders. "It's information that's often not written down anywhere – and we're able to share it with clients and show what others are doing so that they have a more coordinated bargaining perspective than before. The unions have been doing this for decades – employers are only now starting to catch up."

HR QUICK HITS

Canada Labour Code Amendments

The recently passed federal Budget Bill (C-45) made a number of substantive amendments to the *Canada Labour Code* with respect to vacation pay, general holidays and the complaints process. With respect to vacation pay, the *Code* now provides that any accrued vacation pay must be paid to an employee within 30 days after the date that the employee's employment comes to an end. Changes to "holiday pay" include a new holiday pay calculation and the elimination of the current requirement that employees work at least 15 days in the previous 30 to be eligible for holiday pay. Other notable amendments pertain to the complaints process including new time limits for unpaid wage claims and greater control for inspectors over the inspection process. For more details, see our October 26, 2012 *FTR Now*, "Federal Government Introduces Second Budget Implementation Bill."

THE OLRB DECLINES TO INTERFERE WITH LEGITIMATE SUBCONTRACTOR RELATIONSHIP

A trade union's bargaining rights are protected by subsection 1(4) of the *Labour Relations Act, 1995* (the "Act"). Its bargaining power is not.

BY: JONATHAN A. MAIER

By reinforcing this important distinction in *The Regional Municipality of York and York Region BRT Services*, the Ontario Labour Relations Board ("Board" or "OLRB") has affirmed that it will closely scrutinize attempts by trade unions to extend their bargaining rights "upstream" from a subordinate subcontractor to a principal entity.

This decision involved the business relationship between The Regional Municipality of York ("York Region"), an upper-tier municipality, and York Region BRT Services ("York BRT"), a commercial entity that has contracted with York Region to provide public transit services.

Amalgamated Transit Union Local 113 represents employees of York BRT. After a lengthy and difficult strike between October 2011 and January 2012, the union asked the Board to declare that York Region and York BRT were related employers under subsection 1(4) of the Act.

The union insisted that York Region was "the ghost in the room" when it sought to

bargain with York BRT. According to the union, York Region exercised a significant degree of control over the operations of York BRT, such that its ability to collectively bargain on behalf of its members was unreasonably constrained and thus a related employer declaration was required.

The union was aware of the contractual relationship between York Region and York BRT since it first obtained bargaining rights for the employees of York BRT. However, the union insisted that it only became aware of the degree of control exercised by York Region over York BRT during the recent aforementioned strike. It insisted that the factual foundation for a related employer declaration had emerged once it became aware of the nature and scope of this control.

The Board has developed a relatively consistent approach to its interpretation and application of subsection 1(4). Before the Board will issue a related employer declaration under this subsection, it must first find that:

1. more than one legal entity is involved;
2. these entities carry on associated or related activities; and
3. they operate under common control and direction.

Even if these requirements are met, the Board retains discretion to refuse to issue a related employer declaration if the mischief of an entity attempting to erode a union's existing bargaining rights is absent.

York Region and York BRT sought to have the union's related employer application dismissed on a preliminary basis, prior to the calling of any evidence. They focused on the proper exercise of the Board's discretion. Even if the union's allegations were accepted as true, York Region and York BRT emphasized that a related employer declaration was not necessary to protect the union's existing bargaining rights. Instead, it would allow the union to impermissibly expand them.

> The Board confirmed that a union's bargaining rights should not be confused with its bargaining power.

The Board accepted the preliminary argument and dismissed the union's application. In doing so, the Board articulated three principles that may assist employers who utilize subcontractors on a regular basis:

1. No expansion of bargaining rights: The Board affirmed that it does not generally permit unions to utilize subsection 1(4) of the Act as a mechanism to take their bargaining rights with a subordinate contractor and expand them to cover the principal entity that has a commercial relationship with the subcontractor.
2. Interdependent entities not necessarily related employers: The Board emphasized that the mere presence of control or interdependence will not automatically support the conclusion that the subordinate subcontractor is an indistinguishable "creature" of the principal entity that would require a related employer declaration to be issued. A principal entity's control over, or functional interdependence with, a subordinate subcontractor may well be the "natural product of commercial leverage," rather than a basis for issuing a declaration under subsection 1(4) of the Act.

3. Bargaining rights are different than bargaining power: The Board confirmed that a union's bargaining rights should not be confused with its bargaining power. The Board accepted that the union would prefer to engage with York Region in the course of collective bargaining. However, it determined that such an engagement was unwarranted, since York Region had not engaged in any type of "scheme to defeat the union's bargaining rights through its continued commercial relationship with York BRT."

At most, the relationship between York BRT and York Region adversely affected the union's bargaining power in a way that is endemic in all legitimate subcontracting arrangements. The Board recognized that the union's bargaining power – and the employment of its members – was vulnerable to the possibility of York Region selecting another subcontractor to provide transit services, in place of York BRT. The Board accepted that such circumstances were the product of ordinary market forces, which ought not to be neutralized through the use of a related employer declaration.

The Board noted that the case did not involve the attempted erosion of the union's bargaining rights by re-directing business through a separate non-union entity. Instead York Region had decided to provide public transit services using a series of legitimate subcontracting arrangements, including its arrangement with York BRT. If York Region's relationship with a particular subcontractor were to end, another subcontractor would be retained to fill the void. In this regard, the Board concluded the policy reasons that accompany the granting of a related employer declaration were absent from the union's application.

The Board accepted that such circumstances were the product of ordinary market forces, which ought not to be neutralized through the use of a related employer declaration.

This case serves as an important reminder that the Board will not readily encumber employers with a related employer declaration in circumstances where they are parties to a legitimate subcontracting arrangement.

Jonathan Maier *practises in all areas of labour and employment law. He has appeared before the Ontario Labour Relations Board, the Superior Court of Justice, the Divisional Court and various labour arbitrators and mediators. Jonathan acts on behalf of a wide variety of private sector clients in both Canada and the United States along with several public sector organizations in Ontario including municipalities, police services boards and universities.*

Tel: 416.864.7252
Email: jonathan-maier@hicksmorley.com

EMPLOYMENT CONTRACTS: HOW TO GET IT RIGHT AND HELP YOUR CHANCE OF SUCCESS

What are my chances of winning? This is one of the most common questions an employer will ask before trial. The answer can be influenced by a number of things. Some factors are not in your control, such as how witnesses perform. However, other factors, such as how well employment contracts were prepared at the time of hire, are directly in your control and can have a significant impact on the outcome of a trial.

BY: ELISHA C. JAMIESON

While it's not something we like to think about, every employment situation has the potential for litigation. Here are three steps you can take at the beginning of the employment relationship to maximize your chances of success if litigation does ensue.

1. RETAIN AN EXPERT TO DRAFT THE CONTRACT

Many employment contracts contain termination provisions. While a termination provision can increase the chances of success for the employer at trial, it will only do so if the provision is properly drafted.

In *Wright v. The Young and Rubicam Group of Companies (Wunderman)*, the employer used a contract with an elaborate termination clause. Under the clause, the employee was entitled to base salary only and the amount of notice was dependent on the employee's years of service.

The Court held that the termination clause was unenforceable. First, it did not provide for benefits during the notice period, as required by the *Employment Standards Act, 2000* (the "Act"): the fact that the employer continued benefits for the statutory notice period did not override the non-compliant language. Second, although the contract complied with the Act at the actual time of this employee's termination, there were several possible termination scenarios under the contract that would not have complied with the Act. Accordingly, the clause was invalid.

Drafting a termination clause is a highly technical matter. Although having an expert draft the clause may take more time and money, doing so will increase your chances of succeeding on the issue of notice at trial and will likely decrease the amount of money you spend on a termination of employment.

2. IF YOU HAVE A TEMPLATE CONTRACT, HAVE AN EXPERT REVIEW IT

Some employers make use of employment contract templates to prepare a draft contract. While this practice can often save time and money up front, it should not be a substitute for the advice of employment counsel. Statutory and case law on employment matters can change frequently, and even the best crafted templates cannot address this.

One recent change was seen in the case of *Bowes v. Goss Power Products Ltd.* The Court of Appeal for Ontario declared for the first time that an employee does not have a duty to mitigate damages under an employment agreement that stipulates a fixed term of notice unless the agreement specifically provides for this obligation.

By having legal counsel review your contract, and capturing any changes in the law in the employment contract, you will increase your chances of winning at trial. Using templates may decrease costs up front, but it could cost you more money down the road if the template is not well drafted or is not up-to-date.

3. BE OPEN TO NEGOTIATION

The way in which you present a contract to employees can also influence the outcome of litigation. For example, leaving time for the employee to review the offer and negotiating with the employee about the terms and conditions of the contract can be important considerations at trial.

In *Mesgarlou v. 3xs Enterprises Inc.*, the employer gave the employee two weeks to review an employment contract, which included a termination provision. Before signing the contract, the employee negotiated with the employer for an increase in his bonus. The employer agreed to this increase and the employee signed the contract.

At trial, after determining that the termination provision was unambiguous and complied with the law, the Court focused on the way in which the employment contract was presented to the employee. The Court noted that the employee had a sufficient opportunity to review the contract and was not in a vulnerable bargaining position:

> Granted, the plaintiff didn't seem to pay much attention to the termination clause

> in the contract but that was his choice. He had lots of opportunity to look into it and to seek advice [prior to signing the agreement] ... Nor can it be said that he was in a vulnerable bargaining position in relation to the defendant. He showed that by negotiating such significant increases in his production bonuses. In my view, the plaintiff was simply not particularly concerned about termination and period of notice.

As can be seen from this case, judges take note of the conduct of the parties. For this reason, ensure that you approach the employment negotiations prudently. Give the employee a reasonable time to review the contract before signing it and tell him or her to seek independent legal advice. Taking these steps up front may increase the chances that a judge will enforce the termination provision at trial.

REAP THE REWARDS OF PREPARATION

Although employers hope that any new hire will work out in the long term, some employment relationships will inevitably come to an end prematurely. When they do, and litigation ensues, you want your litigator to be in the best position possible to argue the merits of the case at trial. While there will always be aspects of the litigation process that are not within your control, many aspects are and should be handled with care. The more care taken at the beginning of the employment relationship, the better your chances of winning at trial.

Elisha Jamieson *is a member of the firm's Litigation Group and brings a practical view to litigation, working with her clients to develop the best strategy for the particular issue at hand. Elisha has developed a niche in class action litigation on behalf of employers. She has represented clients in trials, hearings, mediations and appeals and has appeared as counsel before various administrative tribunals, the Superior Court of Justice, the Divisional Court, and the Court of Appeal for Ontario.*

Tel: 416.864.7344
Email: elisha-jamieson@hicksmorley.com

QUICK STUDY

From his call to the Bar in 2002, Mark Mason has quickly gained recognition as one of Ontario's leading counsel in the municipal sector, with a special interest in the emergency services sector. Mark's law practice is broad, and ranges from employment litigation to human rights proceedings to all facets of collective bargaining in both the public and private sectors.

Mark spoke with *FTR Quarterly* in December about his career, his current practice and his life outside of law.

We've been chasing you all over the province this week. What's keeping you busy?

I had an interest arbitration hearing in Haliburton, then three days of bargaining in Peterborough related to an Emergency Medical Services ("EMS") agreement. I represent a lot of different municipalities, so roaming across Ontario isn't unusual for me.

Has Ontario always been home?

It has. I grew up on a beef farm outside Little Britain, and went to high school nearby in Lindsay. Then I moved to Kingston to do a commerce degree, and then to Toronto to do my law degree at Osgoode Hall. Today my family and I live in Whitby, so I've enjoyed living in a few places in the province.

Where did the interest in law develop?

I always had law in the back of my mind but my interest in labour law came after taking an industrial relations course in my second year at Queen's. I was fascinated by it. I carried the focus into law school, taking as many labour and employment courses as I could.

When did you make the move to Hicks Morley?

I applied for a summer student position while in law school and got it. Then I articled here, was hired back and I'm now in my fourth year as a partner.

How has your practice evolved?

My first two years I did a bit of everything like everyone else, but I did a lot of work early on with John Saunders gathering data on EMS wage rates and reviewing collective agreements. That was the hook for me. The materials we developed and continue to maintain are now the leading resources in the EMS area.

I was really in the right place at the right time because massive changes were occurring in the EMS sector as municipalities were becoming responsible for these services just as I was starting my career. We were able to use our position in the marketplace and our significant municipal sector client base to become heavily involved in this new area of work. At the same time, I was also developing an interest and level of expertise in the fire sector.

That work, and our firm's previous expertise and reputation in the other areas of municipal labour law, paid off though and we continue to grow the largest management-side labour practice in emergency services in Ontario.

What are the main challenges in the municipal sector now?

Negotiations are a lot more difficult. Before 2008, people were looking for wage increases in the 3% or higher range and sometimes that was possible.

It's different now. Municipalities are facing a huge financial challenge, so instead of 2.5-3.5% increases, we're negotiating 0-2%. As municipalities look for ways to improve their operating flexibility and efficiency, operational issues are becoming increasingly important, which adds a whole other element to the bargaining process. We work with clients to prioritize their needs and focus on the two or three things that they really need to fix in each round of bargaining based on their needs and our knowledge of the sector.

And more municipal councils are willing to hold the line in the face of potential labour disruption because they can't afford agreements similar to those negotiated or awarded in the past. From a bargaining standpoint, that makes it challenging because the money is simply not at the table anymore.

Finally, I would expect that the issue of reform in the interest arbitration system is an area that will continue to remain in the forefront through 2013.

Any trends in particular that employers should note?

I think there's a growing trend, especially in the emergency services sector, for the public sector unions to try and obtain a greater say in what have traditionally been management rights and they're suggesting language that's more restrictive as well. With municipalities needing more flexibility than ever to control costs, it's a high-level problem that you have to be mindful of in negotiations. Increased benefit costs and the need for cost containment strategies remain of interest across the sector.

With the firefighters, more municipalities are facing the demands for condensed scheduling and 24-hour shifts. But municipalities have many concerns about these, including health concerns and whether these allow the flexibility they need to manage schedules and operations cost-effectively.

What do you enjoy doing in your downtime?

I've been married for 11 years now, and we have two young kids – my daughter is eight and my son is six. Most of our downtime is spent with them, supporting their sports and activities. My son started playing lacrosse and my daughter is into horseback riding and I've really enjoyed watching their passion in those areas develop. We recently moved to a different home in Whitby that came with a huge 220-gallon fish tank built in, so I've had to get up to speed fairly quickly on managing an aquarium. It's been quite a task!

HICKS MORLEY WELCOMES TWO NEW PARTNERS

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

JOHN A. PREZIOSO

John Prezioso is a partner in Hicks Morley's Toronto office, practising exclusively in the area of pensions, employee benefits and executive compensation. John advises a range of private and public sector clients on matters relating to pension plan governance, compliance and administration, including issues relating to benefit entitlement, communications, pension investment, conversions and wind-ups. He also advises employers with respect to the administration and modification of group benefit plans, including retiree benefit plans. John regularly drafts and provides employment and tax advice in relation to equity-based and other incentive compensation plans.

John can be reached at 416.864.7338
or john-prezioso@hicksmorley.com

AMY R. TIBBLE

Amy Tibble is a partner in Hicks Morley's Toronto office and advises a wide variety of clients in both the public and private sectors in all areas of labour relations and employment law. Amy frequently appears in court and before tribunals on both provincial and federal matters. Her focus is advocating for employers in human rights and litigation matters. Amy's secondary focus is to provide in-house training to clients on existing and emerging legal obligations. Amy's clients appreciate her ability to advocate on their behalf and her practical and cost-effective approach to legal challenges.

Amy can be reached at 416.864.7539
or amy-tibble@hicksmorley.com

HICKS MORLEY WELCOMES TWO NEW ASSOCIATES

Hicks Morley is pleased to announce that the following new associates have joined the firm.

JODI GALLAGHER HEALY

Jodi Gallagher Healy is joining Hicks Morley's Toronto office as an associate after practising at a full-service international firm for more than eight years. Jodi advises on a wide range of labour and employment law issues, including labour relations, human rights, wrongful dismissal, employment standards and workplace privacy issues. Jodi has appeared before a variety of arbitrators, mediators, administrative boards and courts. Jodi has served on the Executive of the Ontario Bar Association's Labour and Employment Section since 2009.

Jodi can be reached at 416.864.7035
or jodi-gallagherhealy@hicksmorley.com

MAUREEN M. QUINLAN

Maureen Quinlan is joining Hicks Morley's Toronto office as an associate and has been practising labour and employment law for more than ten years. She advises employers and litigates on their behalf on a wide range of labour and employment-related issues, including labour disputes, wrongful dismissal, employment standards, employment contracts, human rights, privacy, workplace safety and insurance and disability benefit-related claims. Maureen has been involved in matters before all levels of court in Ontario and the Federal Court of Canada and has appeared before various arbitrators and administrative tribunals, at both the federal and provincial levels.

Maureen can be reached at 416.864.7036
or maureen-quinlan@hicksmorley.com

TORONTO
77 King St. W.
39th Floor, Box 371
TD Centre
Toronto, ON M5K 1K8
Tel: 416.362.1011
Fax: 416.362.9680

WATERLOO
100 Regina St. S.
Suite 200
Waterloo, ON N2J 4P9
Tel: 519.746.0411
Fax: 519.746.4037

LONDON
148 Fullarton St.
Suite 1608
London, ON N6A 5P3
Tel: 519.433.7515
Fax: 519.433.8827

KINGSTON
366 King St. E.
Suite 310
Kingston, ON K7K 6Y3
Tel: 613.549.6353
Fax: 613.549.4068

OTTAWA
150 rue Metcalfe St.
Suite 2000
Ottawa, ON K2P 1P1
Tel/Tél: 613.234.0386
Fax/Téléc: 613.234.0418

hicksmorley.com

Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

FTR Quarterly is published four times per year by Hicks Morley Hamilton Stewart Storie LLP. The articles and other items in *FTR Quarterly* provide general information only, and readers should not rely on them for legal advice or opinion. Readers who need advice or assistance with a matter should contact a lawyer directly.